SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 366

THE UNITED STATES OF AMERICA, PETITIONER

vs.

JASPER WHITE

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

INDEX

In the District Court of the United States for the Middle District of Pennsylvania

December Term, 1942

No. 10790—Dec. Term, 1942

IN RE LOCAL NO. 542, INTERNATIONAL UNION OF OPERATING ENGINEERS AND JASPER WHITE, ASSISTANT SUPERVISOR THEREOF, A WITNESS BEFORE THE GRAND JURY

Presentment

Filed Jan. 13, 1943

Come now the Grand Jurors for the United States of America, duly empaneled and sworn in the District Court of the United States for the Middle District of Pennsylvania at the December 1942 Term of said Court, and upon their oaths present and charge:

That on the 28th day of December 1942, the Honorable Judge Albert Watson did issue a subpoena duces tecum to Local No. 542, International Union of Operating Engineers, 201 North Broad Street, Philadelphia, Pennsylvania, calling for the production of certain books and records as specified in said subpoena, that said subpoena duces tecum was served on Local No. 542, International Union of Operating Engineers by Charles Schack, Deputy United States Marshal at Philadelphia, Pennsylvania, by handing a true copy thereof to the President of said Local No. 542 and making the contents o fthe said subpoena known to the president on December 30, 1942; that on January 11, 1942, one Jasper White did appear before the Grand Jury and did represent that he appeared pursuant to the aforesaid subpoena and on behalf of said Local No. 542 and that he was assistant supervisor for said Local

2 No. 542 and had the books and records called for by the aforesaid subpoena duces tecum in his possession; that the said Jasper White did refuse to turn over said books and records of the Grand Jury; that the conduct and attitude of said Jasper White was such as to hinder, prevent, and delay the inquiry of the Grand Jury and to obstruct the due process of the Federal Court and the administration of justice in disregard fo the court's order, as will more fully appear from a transcript of his testimony before said Grand Jury, which is herewith attached, made a part hereof, and marked "Exhibit A." A copy of the aforesaid subpoena issued to Local No. 542 is attached hereto as "Exhibit B."

Wherefore, the Grand Jurors present said Jasper White to this Honorable Court as a contumacious witness, and respectfully request that he be dealt with accordingly.

(S) ADAM W. MAYAN,
Foreman.

Dated at Harrisburg, Pennsylvania, this 13th day of January A. D. 1943.

3 *Exhibit A to presentment*

TESTIMONY OF JASPER WHITE

Given before the Federal Grand Jury, January 11, 1943, at Harrisburg, Pennsylvania

4 JASPER WHITE, having been duly sworn according to law, was examined as follows:

By Mr. DOBEY:

Q. Mr. White, we have issued a subpoena duces tecum to Local Union No. 542, International Union of Operating Engineers; are you a representative of that organization?

A. I am.

Q. What is your position?

A. Assistant Supervisor.

Q. Is that equivalent to assistant or business agent?

A. It would be Business Manager.

Q. Assistant Business Manager?

A. That is correct.

Q. And the subpoena we have issued to the Union calls for the production of certain documents; do you have those documents with you?

A. I have a statement here.

Q. Would you mind answering my question whether you have the documents with you?

A. I have. I am the Assistant Supervisor of Local Union 542, International Union of Operating Engineers. On December 31, 1942 a subpoena duces tecum was served on M. F. Morgan, President of Local Union 542. This subpoena was directed to Local Union 542 and I now have that subpoena with me and am

5 here pursuant thereto. I have brought with me the requested papers, documents, and writings. Upon advice from counsel, whom I have consulted on behalf of Local Union 542, International Union of Operating Engineers, and on behalf of myself, in my capacity as an Assistant Supervisor thereof, and individually, and in view of the opinion of said counsel that great

uncertainty exists today as to what may or may not constitute a violation of Section 276 (b), Title 40, of the United States Code. I refuse to produce the documents referred to in said subpoena upon the ground that they may tend to incriminate Local Union 542, International Union of Operating Engineers, myself as an officer thereof, or individually. I therefore, claim on behalf of Local Union 542, its officers and members, and on my own behalf, the immunity granted under the Fourth and Fifth Amendments of the Constitution of the United States.

Q. As I understand your position, Mr. White, even if we assured you that the Union itself would not be a defendant, you would still claim immunity?

A. Would you repeat the question?

Q. My question is even though we assured you that the Union itself will not be a defendant—the Union Organization—nevertheless, you would still refuse to produce the records?

A. I would have to let my counsel answer that question.

(Witness withdraws from jury room to consult with counsel.)

(Witness returns to jury room.)

WITNESS. What is your question?

(Question read as follows: My question is even though we assured you that the Union itself will not be a defendant, the Union Organization, nevertheless you would still refuse to produce the records?)

6 Q. Your answer would still be no?

A. Yes; upon advice from counsel.

Q. You have the records with you?

A. Yes.

Q. Mr. White, we will have to ask you to come back on Wednesday afternoon at 3:00 o'clock. The Court is not here at the present time, otherwise we would check the matter up immediately, but unfortunately we cannot do that and the Court will be here on Wednesday afternoon. We will have to ask you to come back at that time.

A. All right.

Mr. CLARK. Could he come back?

WITNESS. I will come back.

Mr. DOBET. What we will do, we will draw up an order for the approval of the jury, to be presented to the Court, and then the Court will enter its decision on it, and we have no doubt that the decision will be that the records must be submitted.

7 I hereby certify that the testimony of Jasper White is contained fully and accurately in the notes taken by me and that the above copy is correct transcription of the same.

(S) JOHN RUTH,
Court Reporter.

8 *Exhibit B to presentment*

District Court of the United States of America

No. — .

THE UNITED STATES

vs.

GRAND JURY

The President of the United States of America

TO LOCAL #542, INTERNATIONAL UNION OF OPERATING ENGINEERS, *201 North Broad Street, Philadelphia, Pennsylvania.*

You are hereby commanded to appear in the District Court of the United States for the Middle District of Pennsylvania, at the Courthouse, in the city of Harrisburg, in said District, on the eleventh day of January, A. D. 1943, at 2.00 o'clock P. M. of said day, and also that you bring with you and produce at the time and place aforesaid—

1. Copy of constitution of Local #542, International Union of Operating Engineers.

2. Copy of bylaws of Local #542, International Union of Operating Engineers.

3. All books and records showing the receipt and disposition of work permit fees collected from January 1, 1942, to date.

4. All books and records showing the names of the persons who have collected work permit fees on behalf of Local #542, International Union of Operating Engineers, the amount collected by each such person, and from whom collected, for the period January 1, 1942, to date.

5. All applications for membership in Local #542, International Union of Operating Engineers, made during the period January 1, 1942, to date.

6. All records showing the action taken by Local #542, International Union of Operating Engineers on all the applications for membership in said Union referred to in Paragraph 5 of this subpoena.

7. Copies of all temporary permits issued by Local #542, International Union of Operating Engineers during the period January 1, 1942, to date.

8. Permit books for the period January 1, 1942, to date.

9. All interoffice memoranda of Local #542, International Union of Operating Engineers, in any way pertaining to the collection of work permit fees during the period January 1, 1942, to date.

10. All correspondence passing between Local #542, International Union of Operating Engineers, its officers, agents, and employees, and the International Union of Operating Engineers, its officers, agents, and employees in any way pertaining to work permit fees during the period January 1, 1942, to date.

11. All minutes of Local #542, International Union of Operating Engineers and all minutes of committees and boards thereof for the period January 1, 1942, to date.

Then and there to testify on behalf of the United States, and not depart the court without leave thereof or of the District Attorney. Hereof fail not under penalty of what may befall you thereon.

Witness, the Honorable ALBERT WATSON, District Judge of the United States, this 28th day of December, A. D. 1942, and in the 166th year of the Independence of the United States of America.

(S) W. H. MITCHELL, *Clerk.*
(S) FREDERICK V. FOLLMER, *U. S. Attorney.*

9 UNITED STATES MARSHAL RETURN

THE UNITED STATES OF AMERICA

vs.

GRAND JURY

Received this writ at Philadelphia, Pa., on December 30, 1942 and on Dec. 30, 1942, at Philadelphia, Pa., in my district, I served it on the within-named Local #542, International Union of Operating Engineers, located at 201 North Broad St., Philadelphia, Pa., by handing a true and attested copy thereof to John Mooney, President of the said Union, and making contents of the same known to him.

So answers—

JOSEPH C. REINS, *U. S. Marshal.*
By (S) CHAS. SCHACK, *Deputy.*

MARSHAL'S FEES

Travel	$0.18
Service	.50
	.68

10. *ORDER*

And now, to wit, January 13, 1943, the Clerk of this Court is directed to file the within Grand Jury Presentment in the Crim-

inal Docket under the caption: "United States vs. Jasper White," docketing the same in the usual manner.

(S) ALBERT W. JOHNSON,
United States District Judge.

Approved as to form:

(S) FREDERICK V. FOLLMER,
U. S. Attorney.

[No. 10790 C. D., Dec. Term, 1942. In the District Court of the United States, for the Middle District of Pennsylvania. United States of America vs. Jasper White. Grand Jury Presentment re Refusal of Jasper White to Produce the Books and Records of Local No. 542 International Union of Operating Engineers, etc.]

[File endorsement omitted.]

11 District Court of the United States, Middle District of Pennsylvania

No. 10790

UNITED STATES

v.

JASPER WHITE

Criminal Grand Jury Presentment re refusal to produce books and records, etc. Contempt in One count for Violation of U. S. C.

Judgment and commitment

Filed Jan. 14, 1943

On this 14th day of January 1943, came the United States Attorney, and the defendant Jasper White, appearing in proper person, and by counsel, Robert Fitzsimmons, Esq., 654 Madison Avenue, New York, N. Y. and,

The defendant having been convicted on verdict of the court of the offense charged in the presentment in the above-entitled cause, to wit: Contempt in re Refusal to produce the books and records of Local No. 542 International Union of Operating Engineers, etc., before the grand jury, and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, it is by the Court

Ordered and adjudged that the defendant, having been found

guilty of said offenses, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of Thirty (30) days.

It is further ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

(Signed) ALBERT W. JOHNSON,
United States District Judge.

The Court recommends commitment to Dauphin County Jail.

A True Copy. Certified this 20th day of January 1943.

(Signed) W. H. MITCHELL,
Clerk.

[SEAL] (By) H. F. KAUFMAN,
Deputy Clerk.

12 Remarks: The testimony in this case was taken by court reporter and same will be transcribed and filed in the case No. 10790 C.D. United States v. Jasper White.

13 In the District Court of the United States in and for the Middle District of Pennsylvania

No. 10790 C.D.

UNITED STATES OF AMERICA

vs.

JASPER WHITE

Minutes of Proceedings

Filed Jan. 19, 1943

Before Hon. ALBERT W. JOHNSON, United States District Judge at Harrisburg, Pennsylvania, January 14, 1943.

Appearances

Allen A. Dobey, Esq., Special Assistant to the Attorney General, for the United States; Edward R. Kenney, Esq., Special Assistant to the Attorney General, for the United States; Frederick V. Follmer, Esq., United States Attorney; Herman F. Reich, Esq., Assistant United States Attorney; Robert J. Fitzsimmons, Esq., 654 Madison Avenue, New York, N. Y., for the defendant.

21 By the COURT. Now, Mr. Dobey, what specifically are you asking for now of this court?

By Mr. DOBEY. Your Honor, I would like to ask the court at this time to order the representative of the Union to deliver the records of the Union.

By the COURT. What is his name?

By Mr. DOBEY. Jasper White. To deliver the records into the custody of the Grand Jury and to appear before the Grand Jury and testify concerning those records.

By the COURT. And he has been subpoened by a duces tecum to bring these said records before this said Grand Jury?

By MR. DOBEY. Yes; and he appeared before the Grand Jury and stated he had the records with him but that he refused to turn them over to the Grand Jury on the advice of counsel.

22 *Decision*

By the COURT. After hearing your arguments here and examining some of the authorities cited, the Court orders Jasper White, who has been before the Grand Jury under a subpoena duces tecum and who has refused to produce the books and papers of this local Union—now in support of this——

By Mr. DOBEY. Parden me, may I interrupt at this moment? I think the record should show that Jasper White is present at court at the present time and has the records with him.

By Mr. FITZSIMMONS. That is correct.

By the COURT. So I understand. Now, in support of this order against Mr. Jasper White to produce these records—the Court will state that this Union whose books the witness Jasper White has here in court in his possession and which he has been ordered to produce before the Grand Jury, is a legal entity. It is more than a partnership, but for the purpose here it is one single person or entity which, as we all known, has much more power and authority than an ordinary partnership. The death of a member does not end the Union. It still goes on with great powers that have become sanctioned and permitted by the Government and is allowed in our public and national affairs to act as an entity in many of the most vital questions and matters and business of our national life; and having all those powers—all those privileges and all that protection, this Union owes duties to the Government, to the Nation, and among those duties one important one is to assist in the proper investigation and prosecution of acts against—of any acts that may be against the laws of the Nation where this entity, this Union, has a peculiar special knowledge and
23 information probably without which the Government cannot prosecute violations of the law. Now, there are a number of cases that have been cited—four cases at least here in

support of the position the court has just taken, and no law or decision (and I hold there is a difference between law and decisions. Decisions are the evidence of the law) but the court gives great weight—all courts should give great weight to decisions as being in many or most cases the best evidence of what the law is). No authority has been cited against the position taken by the Government here and already supported by this court. No decisions or authorities have been cited against that position, but all the authorities and decisions referred to or found apparently favor the position of the Government and the position already taken by the court; and among those decisions we have here United States against Greater New York Life Poultry Chamber of Commerce in 34 Federal Reporter—Second series, starting on page 967, and I read with approval what is stated on page 968 by Judge Kennedy as follows (and this is a parallel case it appears. It is a case in point):

"In the first place the evidence discloses that the inquiry made by the district attorney and representative of the government in charge of the grand jury investigation involved the question concerning the books and records of Local 167, of which the defendant was an officer and secretary-treasurer at the time he appeared before the grand jury, and that his appearance there was in response to a subpoena duces tecum to present the books and records of that association concerning which his failure so to do, or in such full measure as the circumstances would seem to demand, the defendant was interrogated. This it would seem was a duty imposed upon the defendant which he could not evade under the rule in Heike v. United States, 227 U. S. 131, 33 U. Ct. 228, 57 L. Ed. 450, and other cases. Neither do I believe that because the same subpoena was of a personal nature to the defendant should exempt him from giving testimony concerning the books, papers, and documents of the association of which he was an official."

Now we have—this proposition is also—the position of the Court is also supported by the decision in the case of the United States against B. Goedde & Co., 40 Fed. Supp., starting on page 534, from the opinion of Lindley, District Judge, as follows:

24 "However, it is further apparent that inasmuch as the voluntary associations are subject to indictment, as has been pointed out, and constitute, in view of the law, separate legal entities, the pleas are bad on their face as to any immunity claimed for the voluntary associations. Nor can the contention that immunity extends to each and every member of the association, so far as the association's documents are concerned, have

any force. Obviously, any witness may assert and maintain his constitutional right to refuse to incriminate himself. But the papers of the association are in no wise the papers of each of the members. They belong to the separate entity, the association, which is itself indicted and which, under the statute, is not immune from production of testimony. No immunity can be claimed by any individual because of the contents of documents of a third person, including an association. Furthermore the individual officials have no right to complain if they produce papers of the association which they hold not in their private capacity but as officials of the separate legal entities. Then, too, the pleas do not disclose any defendant's testimony which tends to incriminate him. The production of the documents was a duty imposed upon defendants."

Then there's a long line of cases cited. So, in view of the law, as we find it, the court has but one duty to perform, and that is to order this witness, Jasper White, to produce the papers and documents of Local Union No. 542, which he has been subpoenaed to produce, he having been before the Grand Jury right now in session, and he being here in court with those said papers and documents. And you may prepare, if you wish, the proper written order, and the witness will, if you want him brought before the court——

By Mr. DOBEY. I think, your Honor, he should come to the Bar and be ordered orally by Your Honor to deliver those records at the present time.

Jasper White appeared before the Bar.

By the COURT. You have been subpoenaed, Mr. White, to produce these papers and documents of Local No. 542 of the International Union of Operating Engineers of 201 North Broad Street, Philadelphia, Pennsylvania. You have those papers with you?

25 By Mr. WHITE. Yes, I have.

By the COURT. Now the Court orders you to produce those before the Grand Jury now sitting in the particular case in which you are subpoenaed to appear.

By Mr. FITZSIMMONS. I want this to be construed in the record as Mr. White's words——

Mr. Mr. DOBEY. I think it would be proper for the court to ask whether he would now produce the records.

By the COURT. Yes. I think it is for the witness. You may give him the advice but it is for the witness to answer.

By Mr. WHITE. I respectfully decline.

By Mr. FITZSIMMONS. Record these as Mr. White's reasons for respectfully declining:

"Upon advice of counsel whom I have consulted on behalf of Local No. 542 of the International Union of Operating Engineers and on behalf of myself in my capacity as Assistant Supervisor thereof and individually, and in view of the opinion of said counsel that great uncertainty exists today as to what may or may not constitute a violation of Sections 385 and 423 of Title 28 of the United States Code, I refuse to produce the books or documents referred to in said subpoena, upon the ground that they may tend to incriminate Local No. 542 of the International Union of Operating Engineers and myself as an officer thereof and/or individually. I therefore claim on behalf of Local No. 542, its officers and members, an on my own behalf, the immunity granted under the Fourth and Fifth Amendment of the Constitution of the United States."

By Mr. DOBEY. Your Honor, we suggest that the Court should hold Mr. White in contempt of court and sentence him accordingly.

By the COURT. I want to ask just one thing. He claims here these books would incriminate himself. Does that change the situation here?

By Mr. DOBEY. No. I think it is clear from the decisions that he cannot claim immunity so far as the production of the records of a third party are concerned.

By the COURT. You ask now that he be found guilty of contempt of court and then that the court take the proper action. Well, I am obliged under the law and the facts here to find Mr. Jasper White guilty of contempt of court. Now, the question is as to the punishment.

By Mr. DOBEY. Your Honor, I would like to say this—The Grand Jury is currently in session. The records were needed at this session and of course we are deprived of those records. It is going to be necessary to call the Grand Jury back after we get the records. We feel the utmost urgency exists in obtaining these records immediately. We therefore suggest that counsel for Mr. White and ourselves jointly contact the Clerk of Court today in Philadelphia and endeavor to expedite this appeal and procure an immediate hearing on this appeal. We recommend that the
27 court stay execution of its sentence for a period of five days pending perfection of the appeal on behalf of the defendant, and that upon the perfection of that appeal the court then take into consideration what further period the execution of sentence should be delayed pending the prompt prosecution of that appeal.

By Mr. FITZSIMMONS. Let me answer that and say that it is my intention to waste no time in perfecting this appeal. I think Mr. Dobey will find, after this experience with me, that my word counts for something. Five days is insufficient. I need ten days.

Saturday and Sunday might be included in the five day period—so give me ten days.

By the COURT. I think we will have no trouble about this procedure. I have your ideas and think we can work out a satisfactory arrangement so as to protect both parties. Now I want to consider the sentence now. If the court is right and your position is untenable, as I think it is—as I feel quite sure it is—then this action is an important matter—a serious matter. Now, I will have to pronounce sentence for this contempt of court. Now, what has been the sentence of the court in these other cases, if you have discovered that.

By Mr. FITZSIMMONS. Anywhere from thirty days to six months. The effect of the sentence is usually (in 99 cases out of 100) that the books then came forward. Immediately in the Goedde case they were produced. As far as your sentence is concerned, it will become academic after it is passed on by the Circuit Court or the Supreme Court.

By the COURT. What would you say as to the time if a jail sentence is imposed?

28 By Mr. DOBEY. I think thirty days.

By the COURT. That is the sentence of the court—that Mr. Jasper White undergo imprisonment in the Dauphin County Jail for a period of thirty days as a punishment for this contempt in refusing to produce the records of this Local No. 542 of the International Union of Operating Engineers, 201 North Broad Street, Philadelphia, Pa. Now, the next question to determine is the length of time that will be allowed to perfect this appeal to our Circuit Court of Appeals of the Third Circuit, if the court is to consider a suspension of the service of this sentence. In other words, if we will suspend the service long enough to have an appeal taken and concluded, what shall be the time for taking out the appeal? Mr. Dobey says five days; you say ten days.

By Mr. FITZSIMMONS. About perfecting the appeal, I would want a little more time. It is a nice question and I have to brief it properly. I have to get the record. I say five days to file my notice of appeal and thirty days to perfect my appeal.

By Mr. DOBEY. That thirty-day period seems a little out of line. The record here can be transcribed today.

By the COURT. It is documentary and can be quickly done.

By Mr. DOBEY. We suggest seven days within which to file his notice of appeal and the period of ten days in which to file the record.

By Mr. FITZSIMMONS. That is alright.

29 By the COURT. Ten days in addition to five. Five days to complete the notice of appeal; seven more days to complete the record—that is what you say. Of course you both can

impress properly on the Circuit Court the importance of this so as to get an early decision.

By Mr. DOBEY. I think it is the type of matter in which the Circuit Court would give us a preference.

By the COURT. Are you satisfied with five and seven—five days for notice and seven more days to perfect the appeal.

By Mr. FITZSIMMONS. Seven more days to file my record and an additional few days to file my brief.

By the COURT. That will be for the Circuit Court. I am going to give you five days to complete your Notice of Appeal and I am going to give you ten more days to perfect your appeal by proper filing of the records. I think that will be ample. In the meantime, I will suspend the execution of this jail sentence—it ought to be until we have our decision. If these terms are met, I will suspend sentence of the execution of the jail sentence of thirty days in the Dauphin County Jail until we have a decision from the Circuit Court of Appeals.

By Mr. FITZSIMMONS. Say five days after the handing down of the decision by the Circuit Court of Appeals. I am entitled to a copy of it and if I want to go further.

30 By the COURT. Five days in addition, providing these records are furnished on call of the Grand Jury within five days from the decision of the Circuit Court of Appeals, provided the Court's order is sustained.

By Mr. DOBEY. Mr. Reich has raised a technical question on the matter of the record.

By Mr. REICH. I believe Your Honor said he would impose a sentence and suspend the execution. The Supreme Court has held that an indefinite suspension of sentence, without more, is void.

By the COURT. I understand. You cannot suspend execution without completing the sentence. The suspension is void. Suspension always requires probation. I will put the defendant on probation for the period of the suspension of the sentence.

By Mr. FITZSIMMONS. May I say I take exception.

By the COURT. Exception is allowed to the witness Jasper White.

By Mr. FITZSIMMONS. I think your Honor is aware that Local No. 542 realizes their responsibility to their country and want to do everything possible to cooperate. At the same time, especially in these days of changing decisions—Haddock v. Haddock, which has been followed for years, the other day suddenly changed. We have no rule and we feel it is necessary and important to get one, and that calls for our present attitude before you.

31 By the COURT. You have a right to take your appeal. That is the right citizens have in our Democracy. The

court has endeavored to give you a fair and full opportunity to take such appeal, during which time no harm will be done to you. In other words, you will be given a full and fair opportunity to test the order of the court in a higher tribunal. I hope they will be able to give you an early hearing. Mr. Dobey, what has been the procedure in these other cases? There has been no appeal in the others. I was wondering whether we should put the witness under bail for this period.

By Mr. REICH. If he is on production the courts have held that this is not a final judgment from which an appeal would lie. I stated to the court that a defendant is either sentenced definitely to a jail sentence, or if the sentence is imposed and suspended without more, the Supreme court has held that to be void; there is no sentence. The third is where a court imposed sentence, suspends execution and places on probation. In that case there can be no appeal while the probation is in effect. The only other alternative is to impose the sentence and then release on bail pending appeal.

By the COURT. I am inclined to think that will be right. We seem to agree on that. I will vacate that order of probation, and I will suspend sentence as I have stated and will put the witness, Mr. Jasper White, under bail for his appearance and production.

By Mr. DOBEY. I think Mr. Reich has in mind that you do not suspend sentence; that you impose sentence and that Mr. White be taken in custody by the Marshal and immediately you may approve his release on bail pending his appeal.

32 By the COURT. That procedure will be right. I have imposed the sentence, and Mr. White is now in the hands of the Marshal.

By Mr. FITZSIMMONS. May I now ask for bail in the nominal sum of one dollar?

By the COURT. I will grant the placing of Jasper White on bail.

By Mr. DOBEY. I suggest a personal bond of $100.00.

By the COURT. That he sign a personal bond without surety in the amount of $100.00. That is very fair, and that is what I will do. I will place him on his personal bond in the sum of $100.00.

By Mr. FITZSIMMONS. May I ask you now and say to you as an officer of the court in other jurisdiction, under these circumstances, fingerprinting is dispensed with at this time.

By the COURT. I would like to see that avoided if it can be done legally, and for the present I state to the Marshal that he be not fingerprinted.

33 United States Circuit Court of Appeals, Third Circuit

UNITED STATES OF AMERICA

vs.

JASPER WHITE, DEFENDANT APPELLANT

Assignments of error

Filed Jan. 22, 1943

Now comes the defendant appellant Jasper White, by his attorney, Robert J. Fitzsimmons, Esq., and files the following as his assignment of errors herein and says that the judgment entered herein is erroneous and unjust for the following reasons:

1. The Court committed prejudicial and reversible error in adjudging the defendant in contempt of Court for failure to obey the order of the Court directing the production of the books and records of Local Union 542, International Union of Operating Engineers, before the Grand Jury, pursuant to a subpoena duces tecum served upon a officer of that organization.

2. The Court committed prejudicial and reversible error in ordering the production of the books and records of Local 542 International Union of Operating Engineers, an unincorporated association, called for in the subpoena duces tecum served upon a officer of the Union, and pursuant to which the defendant appeared before the Grand Jury and refused to turn over the said books.

3. The Court committed prejudicial and reversible error in denying to the defendant, as a representative of a voluntary unincorporated association, the immunity against the self in-
34 crimination of that organization, as provided under the Fifth Amendment of the Constitution of the United States.

4. The Court committed prejudicial and reversible error in ruling that a labor union, an unincorporated voluntary association, is not entitled to immunity from self incrimination, as provided by the Fifth Amendment of the United States Constitution.

5. The Court committed prejudicial and reversible error in ruling that the defendant, as an individual, was not entitled to immunity from self incrimination under the Fifth Amendment of the United States Constitution on the grounds that the questions asked of him and the testimony sought to be elicited from him before the Grand Jury, might reasonably tend to incriminate him in the commission of a crime against the United States.

6. The Court committed prejudicial and reversible error in overruling the defendant's contention that production of the

documents called for in the subpoena duces tecum would constitute an unreasonable search and seizure of the records of Local Union 542, International Union of Operating Engineers, in violation of its rights under the Fourth Amendment of the United States Constitution.

7. The Court committed prejudicial and reversible error in imposing sentence upon the defendant.

By reason of said error and other manifest errors appearing in the record, the defendant-appellant Jasper White prays that the judgment of conviction be set aside and that he be discharged from custody.

Dated New York, N. Y., January 21, 1943.

ROBERT J. FITZSIMMONS,
Attorney for Defendant Appellant,
Office & P. O. Address, 654 Madison Avenue,
Borough of Manhattan,
City of New York.

35 In United States District Court

Criminal Docket—Dec. Term, 1943—10790

THE UNITED STATES
vs.
JASPER WHITE

Attorneys for U. S.: Frederick V. Follmer, U. S. Attorney; Herman F. Reich, Asst. U. S. Attorney, Scranton, Pa.; Allen A. Dolsey and Edward R. Kenney, Special Assistants to the Attorney General. For Defendant: Robert J. Fitzsimmons, 654 Madison Avenue, New York, N. Y.

CASH RECEIVED AND DISBURSED

Jan. 18, 1943—Robert J. Fitzsimmons, $5.00.

CONTEMPT PROCEEDINGS

Jan. 13, 1943—Grand Jury Presentment Re Refusal of Jasper White to Produce the Books and Records of Local No. 542 International Union of Operating Engineers, etc. and Order directing clerk to file said grand jury presentment in the criminal docket under the caption: "United States vs. Jasper White," docketing same in the usual manner (J.)

Jan. 14, 1943—After hearing, Judge Johnson found defendant, Jasper White, guilty of contempt.

Jan. 14, 1943—Sentence: Imprisonment for the period of 30 days, Dauphin County Jail recommended. (J.) 2 cert. copies of Judgment & Commitment handed U. S. Marshal.

Jan. 14, 1943—Order directing clerk to accept personal bond of Jasper White conditioned that defendant shall
36 be and personally appear before Mid. Dist. Court upon Mandate of Circuit Court of Appeals or any further order of this court. (J.)

Jan. 14, 1943—Cert. copy handed U. S. Marshal.

Jan. 14, 1943—Bail Bond in sum of $100 without surety, for appearance before Middle District Court upon the Mandate of the Circuit Court of Appeals or any order of this Court, and order of approval thereon. (J.) (Order of Jan. 14 attached to Bond.) JS 2 & 3.

Jan. 18, 1943—Notice of Appeal and Grounds of Appeal.

Jan. 19, 1943—Copy of Notice of appeal and Clerk's Form of Notice as prescribed by Supreme Court General Orders, and letter giving names of counsel, etc. mailed to Clerk, Circuit Court of Appeals for 3rd Circuit at Phila.

Jan. 19, 1943—Letter notifying Judge Johnson, in accordance with Supreme Court Order No. VII, that notice of appeal was filed.

Jan. 19, 1943—Court Minutes of the Proceedings at Harrisburg, Pa. on Jan. 14, 1943.

Jan. 22, 1943—Assignment of errors.

Jan. 25, 1943—Certified copy of Record on Appeal mailed Clerk, Circuit Court of Appeals, for the Third Circuit, Philadelphia, Pa.

37 [Clerk's certificate to foregoing transcript omitted in printing.]

38 In District Court of the United States, Middle District of Pennsylvania

No. 10790—Dec. Term 1943

UNITED STATES OF AMERICA, APPELLEE

vs.

JASPER WHITE, APPELLANT

Notice of appeal

Name and address of Appellant: Jasper White, Ambler, Pennsylvania.

Name and address of Appellant's Attorney: Robert J. Fitzsimmons, 654 Madison Avenue, New York City, New York.

Offense: Violation of Title 28, Section 386, United States Code (Wilful Contempt of a District Court of the United States).

Date of Judgment: January 14, 1943.

Brief Description of Judgment or Sentence: Defendant Jasper White was sentenced to serve thirty (3) days in the Dauphin County Jail and admitted to bail in the sum of One hundred dollars ($100) pending appeal.

I, the above-named Appellant, hereby appeal to the United States Circuit Court of Appeals for the Third Circuit, from the judgment above mentioned on the grounds set forth below.

JASPER WHITE, *Appellant.*

Dated January 16th, 1943.

39 In District Court of the United States, Middle District of Pennsylvania

UNITED STATES OF AMERICA, APPELLEE

vs.

JASPER WHITE, APPELLANT

Grounds of appeal

1. The Court committed prejudicial and reversible error in adjudging the defendant in contempt of Court for failure to obey the order of the Court directing the production of the books and records of Local Union 542, International Union of Operating Engineers, before the Grand Jury, pursuant to a subpoena duces-tecum served upon an officer of that organization.

2. The Court committed prejudicial and reversible error in ordering the production of the books and records of Local 542, International Union of Operating Engineers, and unincorporated association, called for in the subpoena duces-tecum served upon an officer of the union, and pursuant to which the defendant appeared before the Grand Jury and refused to turn over the said books.

3. The Court committed prejudicial and reversible error in denying to the defendant, as a representative of a voluntary unincorporated association, the immunity against the self incrimination of that organization, as provided under the Fifth Amendment of the Constitution of the United States.

40 4. The Court committed prejudicial and reversible error in ruling that a labor union, an unincorporated voluntary association, is not entitled to immunity from self incrimination as provided by the Fifth Amendment of the United States Constitution.

5. The Court committed prejudicial and reversible error in ruling that the defendant, as an individual, was not entitled to immunity from self incrimination under the Fifth Amendment of the United States Constitution on the grounds that the questions asked of him and the testimony sought to be elicited from him before the Grand Jury, might reasonably tend to incriminate him in the commission of a crime against the United States.

6. The Court committed prejudicial and reversible error in overruling the defendant's contention that production of the documents called for in the subpoena duces tecum would constitute an unreasonable search and seizure of the records of Local Union 542, International Union of Operating Engineers, in violation of its rights under the Fourth Amendment of the United States Constitution.

7. The Court committed prejudicial and reversible error in imposing sentence upon the defendant.

ROBERT J. FITZSIMMONS,
Attorney for Defendant.

[Endorsements:] Notice of Appeal and Grounds of Appeal. Received & Filed Jan. 26, 1943. Wm. P. Rowland, Clerk.

41 [Clerk's certificate to foregoing papers omitted in printing.]

43 In the United States Circuit Court of Appeals for the Third Circuit

No. 8265—October Term, 1942

UNITED STATES OF AMERICA

vs.

JASPER WHITE, APPELLANT

Minute entry of hearing

And afterwards, to wit, the 15th day of February 1943, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable John Biggs, Jr., Honorable Albert B. Maris, and Honorable Herbert F. Goodrich, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof.

44 In the United States Circuit Court of Appeals for the Third Circuit

No. 8265—October Term, 1942

UNITED STATES OF AMERICA

v.

JASPER WHITE, APPELLANT

On Appeal From the Judgment of the District Court of the United States for the Middle District of Pennsylvania

Opinion

(Filed May 24, 1943)

Before BIGGS, MARIS, and GOODRICH, Circuit Judges

GOODRICH, Circuit Judge.

The facts in the case at bar are not in dispute. On December 28, 1942, a subpoena duces tecum was issued by the District Court of the United States for the Middle District of Pennsylvania addressed to a labor union, "Local No. 542, International Union of Operating Engineers," requiring it to produce on January 11, 1943, certain books and records before a grand jury of the
45 United States District Court for the Middle District of Pennsylvania sitting at Harrisburg. The books and records called for were books and records belonging to the union.[1] On December 30, 1942, the subpoena was served on the president of the union.

The grand jury was engaged in an investigation of alleged irregularities occurring in connection with the construction of the Mechanicsburg Naval Supply Depot. On January 11, 1943, the defendant, Jasper White, an assistant supervisor or business manager of the union, came before the grand jury and stated that he appeared in response to the subpoena and that he had brought with him the books and records specified. He then read a statement which had been prepared for him by counsel and refused to turn over the books and records, claiming ". . . on behalf of Local Union 542, International Union of Operating Engineers, and on behalf of myself, in my capacity as an Assistant Supervisor thereof, and individually . . ." the immunity guaranteed by the Fourth and Fifth Amendments to the Constitution of the United States.

[1] There were eleven items specified in the subpoena. The first item specified was a copy of the constitution of the local. The last was its minutes. Certain of the items were obviously germane to the inquiry which the grand jury was conducting.

The judge assigned to preside in the District Court of the United States for the Middle District of Pennsylvania at Harrisburg was not available on January 11, 1943. The defendant was requested to return to the Federal Building on January 13, 1943, at which time the judge was expected to be present. On January 13, 1943, the grand jury filed a presentment charging the defendant with being a contumacious witness and requesting his punishment. On January 14, 1943, the judge held a hearing in respect to the presentment and heard the arguments of counsel. The defendant was in the courtroom and had the books and records with him. So far as the record shows, the District Judge did not examine the books and records called for by the subpoena. He delivered an oral opinion, proceeding on the theory that a
46 labor union cannot avail itself of the privilege against self incrimination[2] and made it clear that if the defendant persisted in his refusal to produce the books and records before the grand jury he would be found guilty of contempt of court. The judge then called the defendant before the bar of the court and directed him to produce the books and records before the grand jury. The defendant again declined to produce the books and records and his counsel read a statement wherein the defendant claimed ". . . on behalf of Local No. 542, its officers and members, and on my own behalf, the immunity granted under the Fourth and Fifth Amendments of the Constitution of the United States."

The question before the Court is: Can the defendant refuse to produce the records of the union on the ground that they will incriminate him? It has been established law since the decision in Boyd v. United States, 116 U. S. 616 (1886), that the right of a witness to refuse to produce books and papers upon the ground that their production would incriminate him must be based upon the fact that the books and papers in respect to which the privilege is asserted are the witness's own books and papers. It is clear that the books and records here are not the private books and records of the defendant alone and that they do not in fact belong to him only. They are the books and records of the union. Nor has the defendant asserted any facts which would bring him by analogy within the rule stated by Wigmore in respect to officers of corporations, that ". . . for any documents therein [corporate records] that concern only the 'private or personal' affairs of the officer, the Court may direct their 'withdrawal from

[2] Citing United States v. Greater New York Live Poultry Chamber of Commerce, 34 F. (2d) 967, 968 (S. D. N. Y. 1929), aff'd 47 F. (2d) 156 (C. C. A. 2, 1931); that original question not involved), cert. denied, 283 U. S. 827 (1931); United States v. H. Goodde & Co., 40 F. Supp. 523, 524 (E. D. Ill. 1941). See also United States v. Lumber Products Ass'n, 42 F. Supp. 910 (N. D. Cal. 1942); In re Local Union No. 750, United Brotherhood of Carpenters and Joiners of America, 33 F. Supp. 504 (N. D. Cal. 1940).

[3] Wigmore on Evidence (3rd Ed. Supp. 1944), § 2259b.

scrutiny.'" citing Wilson v. United States, 221 U. S. 361 at 378 (1911).

47 However, that does not dispose of the case. We think that if the defendant was a member of the union he could avail himself of the privilege against self-incrimination if the documents tended to incriminate him. The appellee claims there is an analogy between corporations and labor unions. If this were so, neither the union nor White as its officer could claim the privilege. Hale v. Henkel, 201 U. S. 43 (1906); Wilson v. United States, 221 U. S. 361 (1911). However, we do not find the analogy persuasive. The reasons why a corporation cannot avail itself of the privilege are stated in Wilson v. United States and Hale v. Henkel, supra. A corporation is a creature of the state legislature, enjoying privileges and franchises subject to the laws of the state and limitations of its charter. When the state grants incorporation, it reserves a visitatorial power to exact compliance with these regulations. Implicit in this situation is the requirement that the corporation maintain books and records to reflect its transactions and that it yield these documents to inspection when its affairs are questioned by the state.

The present day status of Local 542 is quite different. It does not derive its existence from any charter granted by the state. Its books and records are not of a public or even semi-[illegible] acter. They are the private documents of the union members who, had they so chosen, did not need to keep records in the first instance. There is nothing, in the absence of legislation, giving the state a reserved visitatorial power over the union and its affairs. For the purposes of the privilege against self-incrimination the members of the union are in the same position as ordinary individuals who maintain books and records of their transactions. We think if the defendant was a member of the union and the contents of the books and records subpoenaed would, upon examination by the trial judge, have tended to incriminate him, that his claim to privilege should have been allowed.

48 However, the record does not answer the basic question of whether White was a member of the union. It is stated that he was the business manager or assistant supervisor of the union. Whether to hold this position he had to be such a member the Court does not know. The view taken by the court below obviated the necessity for such an inquiry and neither White nor the government offered any evidence or testimony on this issue. Such evidence is in our view highly relevant. The case is, therefore, remanded to the District Court to determine whether White was a member of Local 542. If he was, then the books should be examined by the trial judge to determine whether they tend to incriminate White as an individual. See Brown v.

United States, 276 U. S. 134, 144–145 (1928). If they do, the claim of privilege should be sustained.

The judgment is reversed and the cause remanded for further proceedings in accordance with this opinion.

Dissenting opinion

Brand, *Circuit Judge* (dissenting):

I must record my dissent from the opinion expressed by the majority.

Two questions must be answered in the case at bar: (1) May the defendant refuse to produce the records of the union on the ground that they will incriminate him; and (2) May he refuse on the ground that their production by him will incriminate the union or its members?

The defendant read to the grand jury a statement prepared by his attorney which set out the facts on which he based his claim of privilege under the Fifth Amendment. After the presentment of the grand jury to the court but before the court sentenced the defendant, his attorney read a statement to the District Judge which again stated his client's grounds for claiming the privilege. These statements need not be repeated here. They are set out in the majority opinion.

49 At no time did the defendant assert or allege that he himself was a member of Local No. 542. He did not claim that the books and records of the union contained disclosures so related to his personal acts as to make them virtually his own.[1] He did not assert any facts which by analogy would bring him within the rule stated by Wigmore in respect to officers of corporations.[2] The privilege against self-incrimination is personal. It may not be asserted by one individual on behalf of another.[3] No fact appears in the record before us from which the court below would have been justified in sustaining the claim of privilege. So far as the record shows the defendant is in the position

[1] It is contended that the District Judge should have inspected the books and records to see if their contents would tend to incriminate the defendant. This contention cannot be sustained. It was the defendant's duty to produce the books in order that the court might by an inspection of them satisfy itself whether they contained matters which might tend to incriminate. As was stated in Brown v. United States, 276 U. S. 134, 144, "If . . . [the witness] declined to . . . [produce the records covered by the subpoena], that alone would constitute a failure to show reasonable ground for his refusal to comply with the requirements of the subpoena." In the cited case Mr. Justice Sutherland quoted with approval the decision of the Court of Appeals of Kentucky in Commonwealth v. Southern Express Co., 160 Ky. 1, 3, where it was said, ". . . the individual citizen may not resolve himself into a court and himself determine and assert the criminating nature of the contents of books and papers required to be produced."

[2] "Nor can . . . [the witness] refuse to produce on the ground that some parts of the corporate records would incriminate himself even if such parts were made by himself; though, for any documents thereto that concern only the 'private or personal' affairs of the officer, the Court may direct their 'withdrawal from scrutiny.'" citing Hale v. Henkel, 201 U. S. 90; Wilson v. United States, 221 U. S. 361; and other authorities. Wigmore on Evidence, Third Edition, Volume 8, Section 2259b, 1943, Cumulative Supplement p. 23.

[3] Wigmore, supra, Section 2196.

of any individual who has in his possesison books and records belonging to others and is called upon to produce them before a grand jury. It is axiomatic that unless a witness claims some measure of ownership in records he is not entitled to claim the privilege in respect to them. The defendant may or may not be a member of Local No. 542 but his status in this respect is
50 immaterial. He has chosen to stand on his carefully prepared written statements.[4] He has had his day in court and I think that he, the District Court, and ourselves are bound upon the record. It follows that the answers to the two questions set out in the second paragraph of this opinion must be in the negative.

If however, the defendant had asserted in the court below that he was a member of the union, I would still be of the opinion that the judgment of conviction should be affirmed. Labor unions are not partnerships.[5] A member of a partnership may maintain the privilege against self-incrimination in respect to the production of the records of the partnership. The right to choose one's fellow members, the delectus personarum, which is regarded as one of the most important and indispensable characteristics of a partnership,[6] is not available to the members of a labor union. Generally a worker may be admitted to a labor union without the consent of all of the members. See People v. Herbert, 295 N. Y. S. 251. And a member may not be expelled from the union so long as he meets its membership requirements. Spayd v. Ringing Rock Lodge No. 665, 270 Pa. 67, 113 A. 70; Thompson v. Grand International Brotherhood of Locomotive Engineers, 41 Tex. Civ. App. 176, 91 S. W. 834; Abdon v. Wallace, 95 Ind. App. 604, 165 N. E. 68; Sweetman v. Barrows, 263 Mass. 349, 161 N. E. 272. Unlike the members of a partnership, the members of a union do not act as agents for each other or assume responsibility for the conduct of the other members. Consequently in fact there can be no claim of personal ownership or privity by the members of a union in the records of the organization. The books and
51 records of a labor union are no more the personal property of the individual members than are the funds in a union treasury the private and personal funds of the members.[7]

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[4] Such statements allege only that he is an officer of the union. Since the constitution and bylaws of the union have not been produced, this court has no way of knowing whether or not an officer is ipso facto a member of the union.

[5] I agree with the majority that the analogy between corporations and labor unions is not persuasive. As the majority state, a power of visitation on the part of the state is included with the privileges granted by the charter and the immunity from personal liability which is one of these privileges.

[6] Mechem, Elements of Partnership, Sec. 5.

[7] It is interesting to observe that in at least two cases it has been held that if an officer of a union converts the funds of the union to his own use, he may be found guilty of larceny. See People v. Herbert, supra, and People ex rel. Murphy v. [illegible] 80 N. Y. S. 408. It is true that in the cited cases the defendants asserted the supposed analogy between unions and partnerships and that the Supreme Court of New York in arriving at the conclusion which I have stated, had before it a statute, Section

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

Order allowing certiorari

Filed November 8, 1943

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE 1944

Labor unions are unincorporated associations composed of individuals, but they are also organizations which today operate as entities. Their members do not function as individuals in relation to the public. This fact has been recognized frequently by Congress.[7] The law should not extend to the records of such bodies, or to those of any other unincorporated association which functions as an entity, a privilege hitherto zealously restricted to an individual who claims the privilege expressly on his own behalf. If this conclusion is correct, membership in a union can confer no right upon an individual to claim the privilege guaranteed by the Fifth Amendment on the ground that the production of the books and records of the union will incriminate him or the organization.

It follows that even if it be assumed that the defendant is a member of Local 542, he cannot meet the test imposed by the
52 Supreme Court in Boyd v. United States, 116 U. S. 616, 633. In the cited case Mr. Justice Bradley made use of the definitive phrase "a man's private books and papers." The Supreme Court held that the privilege against self-incrimination guaranteed by the Fifth Amendment was applicable only to a man's personal records. The Boyd case is the governing law today on this point. It is unrealistic to say that by reason of membership in the union, the defendant can meet the test laid down by the Supreme Court in the Boyd case.

Accordingly I conclude that the judgment of conviction should be affirmed.[8]

A true Copy:

Teste:

Clerk of the United States Circuit Court of Appeals for the Third Circuit.

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528 of the Penal Code of New York of 1881, which provided that any person, who having property in his possession as an officer of any person, association, or corporation, appropriated it to his own use, could be found guilty of larceny. Nonetheless, the Court based its conclusion upon the fact that the defendants in the two cases cited were not possessed of such an interest in the moneys of their union as to enable them to plead ownership. See also Starr v. Chase [1924] 4 D. L. R. 55, [1924] S. C. R. 495—Can.

[7] For example, the right to collective bargaining has been established by law. See Sections 7–8 of the National Labor Relations Act, Act of July 5, 1935, c. 372, 49 Stat. 452, 29 U. S. A., §§ 157–158. Labor unions likewise are given a special status in respect to the antitrust laws of the United States. Section 20 of the Act of October 15, 1914, c. 323, Sec. 6 (The Clayton Act), 38 Stat. 731, 15 U. S. C. A. § 17. The Norris La Guardia Act protects labor unions from injunctions for the purposes specified in the Act. See Section 4 of the Act of March 23, 1932, c. 90, 47 Stat. 70, 29 U. S. C. A., § 104.

In this connection see what Mr. Chief Justice Taft stated in the First Coronado Case, United Mine Workers v. Coronado Coal Co., 259 U. S. 344 at p. 391.

[8] Compare the following four decisions of lower federal courts: United States v. B. Goedde & Co., 40 F. Supp. 523, 534; United States v. Greater N. Y. L. F. Chamber of Commerce, 34 F. Supp. 967, 968, affirmed 47 F. (2nd) 156, cert. den. 283 U. S. 837; United States v. Lumber Products Ass'n, 42 F. Supp. 910; In re Local Union No. 550, United Brotherhood of Carpenters and Joiners of America, 33 F. Supp. 548.

53 In the United States Circuit Court of Appeals for the Third Circuit

No. 8265—October Term 1942

UNITED STATES OF AMERICA

vs.

JASPER WHITE, APPELLANT

Judgment

Filed May 24, 1943

Present: BIGGS, MARIS, and GOODRICH, Circuit Judges.

On appeal from the District Court of the United States for the Middle District of Pennsylvania.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Middle District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed, and the cause is remanded to the said District Court for further proceedings in accordance with the opinion of this court.

By the Court:

GOODRICH, *Circuit Judge.*

MAY 24, 1943.

55 In the United States Circuit Court of Appeals for the Third Circuit

October Term, 1942

No. 8265

UNITED STATES OF AMERICA, APPELLEE

v.

JASPER WHITE, APPELLANT

Petition for Rehearing

Filed June 7, 1943

Comes now the United States of America, the appellee in the above-entitled cause, and presents, this, its petition for a rehearing of the above-entitled cause and, in support thereof, respectfully shows the following:

I. The judgment of this Court in the above-entitled cause, rendered on May 24, 1943, reversed the decision of the Dis-

Court of the United States for the Middle District of Pennsylvania sentencing the defendant, Jasper White, to thirty days in jail for criminal contempt.

II. The sole ground for this petition is to suggest that the Circuit Court lacked jurisdiction to hear the appeal of the de-
56 fendant Jasper White. The question of jurisdiction was not raised or considered by the Circuit Court in hearing the defendtn's appeal and reversing the judgment of the District Court.

III. The defendant's appeal in this case should have been taken by petition for allowance of appeal pursuant to section 8 (c) of the Act of February 13, 1925 (28 U. S. C. A., section 230). Instead of following this procedure the defendant gave notice of appeal under Rule 3 of the Rules of Practice and Procedure of the Supreme Court applicable to proceedings after plea of guilty, verdict of guilty, or finding of guilt by the court if a jury has been waived. These Rules were not applicable to the instant case, since in the instant case there was no plea of guilty, verdict of guilty, or finding of guilt by the court after waiver of a jury. In Nye v. United States, 313 U. S. 33, the Supreme Court expressly held that an appeal from a judgment for criminal contempt, such as was involved in the instant case, was governed by section 8 (c) of the act of February 13, 1925 (28 U. S. C. A., section 230). Under that section the defendant was required to apply to the District Court or the Circuit Court for the allowance of his appeal. In the absence of such an application and favorable action thereon, this court lacked jurisdiction to hear the defendant's appeal. Alaska Packers Association v. Pillsbury, 301 U. S. 174.

Wherefore, it is respectfully submitted that this petition for rehearing should be granted, that the Court should pass upon the question of its jurisdiction to hear the defendant's appeal,
57 that the Court should dismiss the defendant's appeal for lack of jurisdiction, and that the Court should withdraw its opinion of May 24, 1943, in this case.

ALLEN A. DOBEY,
Special Assistant to the Attorney General.

TOM C. CLARK,
Assistant Attorney General.

FREDERICK V. FOLLMER,
United States Attorney.

CERTIFICATE

This petition for rehearing is presented in good faith and not for delay.

ALLEN A. DOBEY,
Special Assistant to the Attorney General.

I

AN APPEAL FROM A JUDGMENT OF CRIMINAL CONTEMPT IS GOVERNED BY SECTION 8 (C) OF THE ACT OF FEBRUARY 13, 1925 AND NOT BY THE RULES OF THE SUPREME COURT APPLICABLE TO PROCEEDINGS AFTER PLEA OF GUILTY, VERDICT, OR FINDING OF GUILT BY THE COURT WHERE A JURY IS WAIVED

By section 688 of Title 18, U. S. C. A., the Supreme Court is given the power to prescribe rules of practice and procedure "with respect to any or all proceedings after verdict, or finding of guilt by the court if a jury has been waived, or plea of guilty" in federal criminal cases. Pursuant to this statutory grant of authority the Supreme Court on May 7, 1934, promulgated Rules of Practice and Procedure "in all proceedings after plea of guilty, verdict of guilty by a jury, or finding of guilt by the trial court where a jury is waived" in federal criminal cases. Neither the statutory authority therefor nor the order of the Supreme Court promulgating the rules pursuant to the statutory authority extends to cases of criminal contempt where there has been no plea of guilty, verdict of guilt by a jury, or finding of guilt by the court where a jury has been waived. Consequently, Rule 3 of the Supreme Court's Rules of Practice and Procedure in proceedings after plea of guilty, verdict of guilty by a jury, or finding of guilt by the trial court where a jury is waived, which provides that an appeal may be taken by filing a notice of appeal within five days after the entry of judgment of conviction, was not applicable in the instant case.

59 In Nye v. United States, 313 U. S. 33 (at page 44) (decided April 14, 1941), the Supreme Court expressly held that appeals from judgments for criminal contempt where there is no plea of guilty, verdict of guilty by a jury, or finding of guilt by the court where a jury has been waived, should be taken by petition for allowance of appeal pursuant to the provisions of section 8 (c) of the Act of February 13, 1925, and not by notice of appeal under the Rules of the Supreme Court with respect to proceedings after plea of guilty, verdict of guilty by a jury, or finding of guilty by the court where a jury is waived.[1]

Following the decision of the Supreme Court in the Nye case which was rendered on April 14, 1941, section 689, Title 18, U. S. C. A., was enacted on November 21, 1941, and provided that the

[1] The decision of the Supreme Court in the Nye case overruled Wilson v. Byron Jackson Co., 93 F. (2d) 577 (C. C. A. 9th), where the Circuit Court held that an appeal in a criminal contempt proceeding was properly taken by notice of appeal.

provisions of sections 687 and 688 of Title 18 were "hereby extended to proceedings to punish for criminal contempt of court." However, sections 687 and 688, Title 18, merely give the Supreme Court the power to prescribe Rules of Practice and Procedure in certain types of cases and the effect of the enactment of section 689 is simply to extend the Supreme Court's power to prescribe rules of practice and procedure to include the power to prescribe such rules with respect to proceedings to punish for criminal contempt. The Supreme Court, however, has not yet exercised this grant of authority with respect to proceedings to
60 punish for criminal contempt. The Supreme Court has not yet adopted any special rules of practice and procedure with respect to proceedings to punish for criminal contempt. Nor has the Supreme Court provided by order that the Rules of Practice and Procedure with respect to proceedings after plea of guilty, verdict of guilt by a jury, or finding of guilt by the court where a jury is waived, shall apply to proceedings to punish for criminal contempt. Hence until the Supreme Court expressly adopts special rules of practice with respect to proceedings to punish for criminal contempt or expressly adopts the Rules of Practice and Procedure already established with respect to proceedings after plea of guilty, verdict of guilty, or finding of guilt by the court where a jury has been waived, as applicable to proceedings to punish for criminal contempt, appeals in criminal contempt cases will continue to be governed by the provisions of section 8 (c) of the Act of February 13, 1925, and will require a petition for allowance of appeal.

There is nothing in the language of section 689 to indicate that Congress intended by statutory fiat to make the Rules of Practice and Procedure established by the Supreme Court with respect to proceedings after plea of guilty, verdict of guilty, or finding of guilt by the court where a jury has been waived, applicable also to proceedings to punish for criminal contempt.

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II

IN THE ABSENCE OF A PETITION FOR ALLOWANCE OF APPEAL, AND THE GRANT OF SUCH PETITION BY THE DISTRICT COURT OR THE CIRCUIT COURT, THIS COURT LACKED JURISDICTION TO HEAR THE DEFENDANT'S APPEAL

In the Nye case, supra, involving an appeal from a judgment of criminal contempt, where the defendant, as in this case, improperly endeavored to appeal by notice of appeal rather than petition for allowance of appeal under section 8 (c) of the Act of February 13, 1925, the Supreme Court was equally divided in

opinion as to whether the Circuit Court in that case, in the absence of an application for allowance of appeal, had the power to decide the case on the merits. By reason of the equal division of opinion among the members of the Supreme Court in the Nye case the action of the Circuit Court in taking jurisdiction of the appeal in that case was affirmed by the Supreme Court.[2]

In our view, in the absence of a petition for allowance of appeal and the granting of that petition by the District Court or the Circuit Court, this Court lacked jurisdiction to hear the defendant's appeal. Section 8 (c) of the Act of February 13, 1925, reads as follows:

"No appeal intended to bring any judgment or decree before a Circuit Court for review shall be allowed unless applica-
62 tion therefor be duly made within three months after the entry of such judgment or decree."

Proper application for the allowance of an appeal under this section is mandatory, as appears both from the wording of the section itself and decisions of the Supreme Court. See United States ex rel Coy v. United States, 316 U. S. 342; Wells v. United States, No. 11, Original, October Term, 1942; Steffler v. United States, No. 14, Original, October Term, 1942. In Alaska Packers Association v. Pillsbury, 301 U. S. 174, involving an appeal from a decree in admiralty of the District Court, the Supreme Court held that a notice of appeal was not effective to give jurisdiction of the appeal to the Circuit Court where the appeal was governed by section 8 (c) of the Act of February 13, 1925, and that in the absence of a petition for allowance of appeal and the granting of such petition the Circuit Court had no jurisdiction to hear the appeal. Similarly, in McCrone v. United States, 307 U. S. 61, the Supreme Court held that a notice of appeal was not effective to give the Circuit Court jurisdiction of the appeal where the appeal was governed by section 8 (c) of the Act of February 13, 1925, and that the appeal in that case should have been prayed for and allowed as provided by that section.

The Circuit Court of Appeals for the Fourth Circuit and the Circuit Court of Appeals for the Eighth Circuit have likewise held that a notice of appeal is not effective to give the Circuit Court jurisdiction of an appeal governed by section 8 (c) of the Act of February 13, 1925. Osborne v. United States, 50 F.
63 (2d) 712 (C. C. A. 4th); Share v. United States, 50 F. (2d) 669 (C. C. A. 8th). Both of these decisions hold that in order for the Circuit Court to have jurisdiction of an appeal under

[2] It may be noted that the defendant in the Nye case was in a more favorable position on appeal than the defendant in the instant case for the reason that the Nye case removed any uncertainty as to the proper procedure for taking an appeal from a judgment for criminal contempt.

section 8 (c) of the Act of February 13, 1925, there must be a petition for allowance of appeal and a grant of the petition.

The requirement of the petition for allowance of the appeal and the grant of the petition being jurisdictional, the defect in the instant case was not cured by failure of Government counsel to raise the question of jurisdiction prior to this petition for rehearing. This jurisdictional defect cannot be cured by waiver or even by the consent of the parties. Osborne v. United States, supra.

Conclusion

The appeal in this case should have been taken in accordance with the procedure of section 8 (c) of the Act of February 13, 1925. The defendant's failure to observe the requirements of that section was jurisdictional. Hence the Court should dismiss the defendant's appeal for lack of jurisdiction and should withdraw its opinion of May 24, 1943, in this case.

Allen A. Dobey,
Special Assistant to the Attorney General.

Tom C. Clark,
Assistant Attorney General.

Frederick V. Follmer,
United States Attorney.

64 In the United States Circuit Court of Appeals for the Third Circuit

No. 8265—October Term, 1942

United States of America

vs.

Jasper White, appellant

Order denying petition for rehearing

Filed June 18, 1943

And now, to wit, June 18, 1943, after due consideration, the petition for rehearing in the above-entitled case is hereby denied.

Philadelphia.

John Biggs, Jr.,
Circuit Judge.

65 [Clerk's certificate to foregoing transcript omitted in printing.]

U. S. GOVERNMENT PRINTING OFFICE 1943

FILE COPY

No. 395

In the Supreme Court of the United States

October Term, 1943

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES WILSON

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 366

UNITED STATES OF AMERICA, PETITIONER

v.

JASPER WHITE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General prays that a writ of certiorari be issued to review a judgment of the Circuit Court of Appeals for the Third Circuit which reversed a judgment of the District Court for the Middle District of Pennsylvania sentencing respondent to thirty days in jail for criminal contempt.

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 20–25) is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 24, 1943 (R. 26) and petition for rehearing was denied on June 18, 1943

(R. 31). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

(1) Whether a member of a labor union, responding to a grand jury subpoena duces tecum directed to the union, may refuse to comply with the subpoena on the ground that production of the records called for might tend to incriminate him.

(2) Whether the court below had jurisdiction when the appeal to it from a judgment of criminal contempt was taken by filing notice of appeal pursuant to the Criminal Appeals Rules and there was no application for appeal as required by Section 8 (c) of the Act of February 13, 1925.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

The Fourth Amendment of the Constitution provides in part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * *.

The Fifth Amendment provides in part:

> No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

Section 8 (c) of the Act of February 13, 1925, 43 Stat. 940, 28 U. S. C. sec. 230, provides:

> No writ of error or appeal intended to bring any judgment or decree before a

circuit court of appeals for review shall be allowed unless application therefor be duly made within three months after the entry of such judgment or decree.

STATEMENT

The United States District Court for the Middle District of Pennsylvania issued a subpoena duces tecum in December 1942 addressed to a labor union, Local No. 542, International Union of Operating Engineers, requiring it to produce certain of its books and documents before a grand jury of that court (R. 4–5). After service of this subpoena on the president of the union, respondent came before the grand jury on January 11, 1943, and stated that he was assistant supervisor of the union, that he appeared in response to the subpoena issued to the union, and that he had brought with him the books and records specified in the subpoena (R. 2–3). He refused, however, to produce these documents on the ground that they might tend to incriminate the union, "myself as an officer thereof, or individually" (R. 3). He further claimed immunity on behalf of the union and on his own behalf under the Fourth and Fifth Amendments to the Constitution (*ibid.*).

A written presentment filed by the grand jury charging respondent with being a contumacious witness and requesting his punishment (R. 1–2)

came on for hearing before the district court on January 14, 1943 (R. 6). The court, after hearing argument, ordered respondent to produce the subpoenaed papers before the grand jury (R. 7–10). Upon his refusing to do so on the same grounds as those given before the grand jury, the court adjudged him in contempt and sentenced him to imprisonment for 30 days (R. 6–7).

Respondent, who was released on bail, did not apply for allowance of appeal but gave notice of appeal under Rule 3 of the Criminal Appeals Rules (R. 17–18). In its opinion the court below said that the right of a witness to refuse to produce documents upon the ground that they tend to incriminate him is limited to those which are his own and that the subpoenaed documents were those of the union (R. 22). The court nevertheless held that the books and records of a labor union are also the property of its individual members and that respondent was entitled to claim the privilege against self-incrimination if he was a union member and if the subpoenaed documents would tend to incriminate him (R. 22). The court accordingly reversed the judgment of contempt and remanded the case to the district court with directions to sustain respondent's claim of privilege if the district court found that respondent was a union member and that the subpoenaed documents did tend to incriminate him (R. 23).

Circuit Judge Biggs dissented (R. 23–25) on the ground that labor unions "today operate as entities" and their members "do not function as individuals in relation to the public" and that the law "should not extend to the records of such bodies, or to those of any other unincorporated association which functions as an entity, a privilege hitherto zealously restricted to an individual who claims the privilege [against self-incrimination] expressly on his own behalf" (R. 25).

The Government filed a petition for rehearing raising for the first time the question whether the court had jurisdiction to hear respondent's appeal (R. 26–31). This petition was denied without opinion (R. 31).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred—

(1) In holding that a member of a labor union may assert a constitutional privilege against self-incrimination in respect of subpoenaed books and records of the union.

(2) In reversing the judgment of the district court sentencing respondent for contempt of court.

(3) In remanding the case to the district court with instructions to sustain respondent's claim of privilege if the district court should find that respondent was a member of the union and that the subpoenaed union records tended to incriminate him.

REASONS FOR GRANTING THE WRIT

1. This case presents an important question of constitutional law which has not been, but should be, settled by this Court, namely, whether an officer of a labor union, who is also a member, is entitled to refuse to produce books and records of the union upon the ground that they might incriminate him.

This Court has held that to compel an individual to produce his "private" books and papers for the purpose of connecting him with a crime is to compel him to be a witness against himself, in violation of the Fifth Amendment, and is, by virtue of this fact, an "unreasonable" search and seizure prohibited by the Fourth Amendment. *Boyd v. United States*, 116 U. S. 616. But, to apply the language of *Essgee Co.* v. *United States*, 262 U. S. 151, 158, an officer of a labor union does not hold its books and papers "in his private capacity and is not, therefore, protected against their production or against a writ requiring him as an agent of the corporation [union] to produce them." The court below, recognizing that respondent could assert the constitutional privilege against self-incrumination only if the subpoenaed documents were his own, held that the books and records of an unincorporated association such as a labor union are the private property of each of its members and that any member may rightfully refuse to produce the union

books upon the ground that they tend to incriminate him personally.

The Government submits that this holding that labor unions have no separate and distinct entity ignores the fact that their members—frequently numbered in the thousands and constantly fluctuating—do not function as individuals in their relation to the public. It ignores the fact that the law has widely recognized that the unions are independently functioning entities. As the dissenting opinion below points out (R. 24), members of labor unions do not generally have the power to select their fellow members, an officer who converts union funds may be convicted of larceny, and federal legislation has conferred substantial privileges upon labor unions and has also subjected them to certain restrictions.[1] See *United*

[1] By the National Labor Relations Act (sec. 8, 29 U. S. C. sec. 158), unions are protected against interference, restraint, or coercion by employers of labor. By the same act (sec. 9, 29 U. S. C. sec. 159), a federal agency determines, in case of dispute, what union the employees have selected as their collective-bargaining representative. By the Norris-LaGuardia Act (sec. 3, 29 U. S. C. sec. 103), every undertaking or promise in a contract of employment not to join or not to remain a member of a labor union is declared to be contrary to the public policy of the United States and is denied enforcement in any court of the United States. The Clayton Act (sec. 6, 15 U. S. C. sec. 17), provides that labor unions are not to be held illegal combinations in restraint of trade and that their members, in carrying out the "legitimate objects thereof," shall be exempt from federal antitrust laws. The so-called Anti-Racketeering Act of June 18, 1934 (sec. 6, 18 U. S. C. sec. 420d) provides that the acts shall not be applied so as to

Mine Workers of America v. *Coronado Coal Co.*, 259 U. S. 344, 386–391.

While we think that the decision below must be reversed if this Court determines that, for the purpose of the constitutional privilege against self-incrimination, the records of a labor union are not the personal papers and effects of each and every member, decisions dealing with the claim of personal self-incrimination set up by officers of corporations in opposition to the production of corporate records in their custody have rejected the claim upon a further and somewhat broader ground. In such cases this Court has said that corporations hold their books and records subject to a reserved visitorial power by the State and by the National Government; that a corporation therefore may not resist production upon the ground of self-incrimination; that an officer of a corporation, in assuming custody of its records, accepts the same obligation to produce which rests on his principal; and that he there-

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diminish or affect in any manner the rights of bona-fide labor unions in lawfully carrying out their legitimate objects.

As to specific restrictions imposed on labor unions by federal legislation, see Section 9 of the War Labor Disputes Act of June 25, 1943 (Public Law No. 89, 78th Cong.), providing that no labor union shall make a contribution in connection with any election of a member of Congress or in connection with any presidential election.

If it were relevant to consider the facts concerning the structure of the particular union to which respondent belongs, such an inquiry is not open under the order of remand by the court below.

fore cannot assert any "personal right to retain the corporate books against any demand of government which the corporation was bound to recognize." *Wilson* v. *United States*, 221 U. S. 361, 377–385.[2]

The Government submits that this broader ground of decision likewise applies in the case of an officer of a labor union who resists, upon the ground of personal self-incrimination, a subpoena calling for the production of books and records of the union. We believe that rights conferred upon labor unions by federal legislation (n. 1, *supra*, pp. 7–8) have impressed their books and records, so far as visitorial inspection by the Federal Government is concerned, with a quasi-public character which removes them from the category of the "private" books and property which are given protection on the score of self-incrimination.

The issue is not peculiar to labor unions. Any decision rendered on review would probably be controlling in the case of other kinds of unincorporated associations. It is significant in this regard that most of the leading cases under the Sherman Act have required investigation and examination of the files of unincorporated trade associations.

2. The decision below is believed to be in conflict with the decision of the Circuit Court of

[2] See also *Whaley* v. *United States*, 226 U. S. 478, 489–490; *Heike* v. *United States*, 227 U. S. 131, 142–143.

Appeals for the Seventh Circuit in *Davis* v. *Federal Securities and Exchange Commission*, 109 F. (2d) 6, certiorari denied, 309 U. S. 687. That case held that the records of an unincorporated association, obtained by subpoena served upon one of its members,[3] could be used in evidence against such member. The court, in rejecting the defendant's contention that he was subjected to an unreasonable search and seizure and compelled to be a witness against himself in violation of the Fourth and Fifth Amendments, said (p. 8) that the records of the unincorporated association were not "personal to" the defendant and could "properly be brought into court by subpoena and used as evidence against an officer or agent thereof."

The decision below is in conflict with several district court decisions holding that no privilege conferred by the Fourth or Fifth Amendment authorizes an officer of a labor union to refuse to produce the union books and records upon the ground of self-incrimination. *United States* v. *Greater New York Live Poultry Chamber of Commerce*, 34 F. (2d) 967, 968 (S. D. N. Y.); *In re Local Union No. 550, United Brotherhood*

[3] The court said (p. 8) that there was conflict in the evidence as to whether the subpoena was served upon the member or his secretary but that it regarded this question as immaterial. The court noted that response to the subpoena was by the member's secretary; but the significance accorded that fact is not clear.

of Carpenters and Joiners of America, 33 F. Supp. 544 (N. D. Calif.); *United States* v. *B. Goedde & Co.*, 40 F. Supp. 523, 533–534 (E. D. Ill.); *United States* v. *Lumber Products Assn.*, 42 F. Supp. 910, 916 (N. D. Calif.). In the *Goedde* case the court, after stating that unincorporated associations "constitute, in view of the law, separate legal entities" and that their papers "belong to the separate entity" and "are in no wise the papers of each of the members," said (p. 534):

> No immunity can be claimed by any individual because of the contents of documents of a third person, including an association. Furthermore, the individual officials have no right to complain if they produce papers of the association which they hold not in their private capacity but as officials of the separate legal entities.

The understanding evidenced by these district court decisions, contrary to the decision below, furnishes additional reason for the granting of certiorari. Compare *United States* v. *Constantine*, 296 U. S. 287, 290.

3. Although the decision below remands the case to the district court and hence is not final, there is grave doubt whether a subsequent appeal will be available to the Government, and the appropriateness of certiorari is therefore not diminished by the posture of the case. Cf. *United States* v. *Dotterweich*, pending on certio-

rari, No. 5, present Term. The rule that the Government has no appeal from a judgment of acquittal in criminal cases applies to criminal contempts. *United States* v. *Bittner*, 11 F. (2d) 93, 95 (C. C. A. 4). If the Government were to have an appeal from a judgment for respondent, it could only rest on the Criminal Appeals Act, which provides a direct appeal to this Court from a judgment sustaining a special plea in bar where the defendant has not been put in jeopardy. Self-incrimination may perhaps be asserted by a special plea in bar within the Criminal Appeals Act (*United States* v. *Murdock*, 284 U. S. 141); but where, unlike the *Murdock* case, the proceeding is for contempt of court by reason of the defendant's refusal to produce subpoenaed documents, the defense that the refusal was justified because of the incriminating character of the documents would seem to go to the merits of the issue and the defendant would seem to be put in jeopardy when the cause was submitted to the court for its ruling on this issue.[4] In any event the present respondent has clearly been put in jeopardy since he has actually been sentenced for contempt of court.

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[4] In the *Murdock* case itself, where the defendant was indicted under a section of the Revenue Act penalizing the wilful failure to supply information required by the law or regulations, this Court said (284 U. S. at 149-151) that the proper practice was to try the defense of self-incrimination under the general issue and that the district court should have refused leave to file the plea of self-incrimination.

Nor is it likely that the Government will be in a position to bring the decision below before this Court for review if the district court resentences respondent for contempt after finding either that he was not a member of the union or that the subpoenaed documents were not incriminating. An appeal by respondent from such a purely factual determination appears most unlikely.

The decision below, if not reviewed by this Court, will be controlling on the district courts in the Third Circuit and, as the latest and most authoritative decision on the subject, may well be followed by district courts in other circuits. Accordingly, if the present petition for certiorari is not granted, the decision below may lead to important rulings adverse to the Government which it may be unable to have reviewed either by the applicable circuit court of appeals or by this Court.

4. A question relating to the jurisdiction of the circuit court of appeals is presented. In *Nye* v. *United States*, 313 U. S. 33, appeal from a judgment for criminal contempt was taken by filing notice of appeal, and no application for appeal was made. The same procedure was followed in this case. This Court held in the *Nye* case that appeal from such a judgment is governed by Section 8 (c) of the Act of February 13, 1925, and not by the Criminal Appeals Rules; but the Court (p. 44) was equally divided in opinion as

to whether the circuit court of appeals nevertheless could assume jurisdiction in the absence of an application for allowance of the appeal. The Government in the present case is chiefly concerned with the decision of the court below on the merits. The question of the jurisdiction of that court is, however, raised by the record and is one of importance which has not been, but should be, settled by this Court.

CONCLUSION

For the reasons stated the petition for a writ of certiorari should be granted.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

SEPTEMBER 1943.

U. S. GOVERNMENT PRINTING OFFICE: 1943

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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 366

UNITED STATES OF AMERICA, PETITIONER

v.

JASPER WHITE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the circuit court of appeals is reported at 137 F. (2d) 24.

JURISDICTION

The judgment of the circuit court of appeals was entered on May 24, 1943 (R. 26), and petition for rehearing was denied on June 18, 1943. The petition for a writ of certiorari was filed on September 18, 1943, and was granted on November 8, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether an officer of a labor union, who is in possession of union records demanded for production before a grand jury pursuant to a subpoena duces tecum addressed to the union, may refuse to produce those records on the ground that their production may tend to incriminate him.[1]

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment of the Constitution provides in part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * *.

The Fifth Amendment provides in part:

> No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

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[1] In our petition for certiorari herein, it was suggested, although without any charge of error, that the record presented a further question as to the jurisdiction of the court of appeals when the appeal was taken by filing a notice of appeal pursuant to the Criminal Appeals Rules rather than by application for appeal as required by Section 8 (c) of the Act of February 13, 1925. This question had first been raised by the Government in the court of appeals by a petition for rehearing (R. 26–31), which was denied without opinion (R. 31). However, at the contempt hearing, an extensive colloquy took place between the district judge and counsel (R. 11–14) with respect to the perfecting of the appeal, and it is our view that under the circumstances here presented the appeal should be considered to have been allowed within the meaning of the Act of February 13, 1925. Accordingly, this question is not noticed further in this brief.

STATEMENT

The District Court of the United States for the Middle District of Pennsylvania on December 28, 1942, issued its subpoena duces tecum directed to "Local #542, International Union of Operating Engineers," requiring the union to produce before the grand jury on January 11, 1943, copies of the constitution and by-laws of the union and specifically enumerated union records showing its collections of work permit fees, including the amounts paid therefor and the identity of the payors, from January 1, 1942, to the date of the issuance of the subpoena (R. 4, 5). The United States marshal served the subpoena duces tecum on John Mooney, the president of the union (R. 5). On January 11, 1943, respondent, Jasper White, appeared before the grand jury, acknowledged that he had the demanded documents in his possession, but, describing himself as "assistant supervisor" of the union, declined to produce them "upon the ground that they might tend to incriminate Local Union 542, International Union of Operating Engineers, myself as an officer thereof, or individually" (R. 2, 3). He reiterated his refusal to produce the records after consultation with counsel, even though asked by the prosecutor whether his position would be the same if he were assured that "the Union itself will not be a defendant * * *" (R. 3). On January 13, 1943, he was cited for contempt of court and

during the hearing reiterated his refusal to produce the records (R. 11). Respondent did not tender the records for inspection by the district judge in support of his assertion that their contents would tend to incriminate him or the union, but based his refusal to produce them on an opinion of his counsel that his claim of privilege was justified by the fact "that great uncertainty exists today as to what may or may not constitute a violation of Section 276 (b), Title 40, of the United States Code" (R. 2–3).[2]

The subpoena had been issued during the course of a grand jury investigation into alleged irregularities in connection with the construction of the Mechanicsburg Naval Supply Depot (R. 20). It was directed to the union and served on the union's president. Respondent, who was not shown to be the authorized custodian of the books but who

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[2] This is the so-called "Kick-back Act" (Act of June 13, 1934, c. 482, 48 Stat. 948, 40 U. S. C. 276 (b)). Section 1 of this Act, which was the subject of construction in *United States* v. *Laudani*, October Term, 1943, No. 71, decided January 3, 1944, provides:

That whoever shall induce any person employed in the construction, prosecution, or completion of any public building, public work, or building or work financed in whole or in part by loans or grants from the United States, or in the repair thereof to give up any part of the compensation to which he is entitled under his contract of employment, by force, intimidation, threat of procuring dismissal from such employment, or by any other manner whatsoever, shall be fined not more than $5,000, or imprisoned not more than five years, or both.

nevertheless brought them into court (R. 2, 8), had not personally been subpoenaed to testify before the grand jury nor personally directed by the subpoena duces tecum to produce the union's records. There was neither effort nor indicated intention to examine him personally as a witness.

The district court held the refusal inexcusable, adjudged respondent guilty of a contempt of court (R. 11), and sentenced him to thirty days imprisonment (R. 12).[3] The court below was divided in its reversal of that judgment. The majority held that the records of an unincorporated labor union[4] were the property of all its members and that therefore, if respondent were a union member and if the books and records would have tended to incriminate him, he properly

[3] Immediately after sentence the respondent was released pending appeal on his personal bond in the amount of $100 (R. 14).

[4] The record before the district court is silent as to whether the union was incorporated or unincorporated. Both the district court (R. 8) and the majority and minority of the court of appeals (R. 22, 24) treated the case as one involving an unincorporated union. This treatment seems factually correct in that in respondent's assignment of errors in the court of appeals the union is specifically referred to as a "voluntary unincorporated association" (R. 15). Accordingly, this brief accepts as a fact that the union was unincorporated. Of course, if the union were incorporated there would be no question but that the judgment below should be reversed on the authority of *Wilson* v. *United States*, 221 U. S. 361, and other like cases cited, *infra*, p. 12.

could refuse to produce them before the grand jury (R. 22). Accordingly, the court below remanded the case to the district court with directions to sustain the claim of privilege if after further inquiry it should determine that respondent was in fact a member of the union and that the books would tend to incriminate him as an individual (R. 22–23). The dissenting judge took the position that a labor union, even if unincorporated, is an organizational entity, functioning as such independently of its individual members, that consequently its records are not the property of its individual members, and that, since under *Boyd* v. *United States*, 116 U. S. 616, the privilege against self-incrimination cannot be asserted in respect of the books and papers of a third person, the refusal to produce them before the grand jury was not authorized by the Fifth Amendment (R. 25).

SPECIFICATION OF ERRORS TO BE URGED

The circuit court of appeals erred:

1. In holding that a member of a labor union who is in possession of books and records of the union may decline to produce such books and records pursuant to a subpoena duces tecum addressed to the union, on the ground that the production of such books and records may tend to incriminate him individually.

2. In reversing the judgment of the district court sentencing respondent for contempt of court, and in remanding the case to the district court

with instructions to sustain respondent's claim of privilege if the district court should find that respondent was a member of the union and that the subpoenaed books and records tended to incriminate him.

SUMMARY OF ARGUMENT

The court below held that the books and records of an unincorporated labor union are the private documents of the union members, and that for this reason a union member in possession of the books and records may decline to produce them in response to a subpoena directed to the union on the ground that their production may tend to incriminate him individually. In so holding, the court disregarded the attributes of distinct personality and of organizational entity which both the courts and the legislatures have in recent years recognized in labor unions. Labor unions are proper parties to litigation in their own right; they may sue and be sued and are liable to criminal prosecution. Their position as functioning legal entities is recognized in such legislation as the National Labor Relations Act, the Railway Labor Act, the Norris-LaGuardia Act and the War Labor Disputes Act, and in a great number of other statutes, both federal and state, which affect their rights and responsibilities. They are now accepted fully as juristic personalities, which for most practical purposes act upon and are acted upon by society without regard to the identity of their individual members.

The distinct juristic personality of labor unions in their relationship to their members is now likewise generally accepted. A labor union functions internally as an organization in much the same way as a corporation. It normally operates under a constitution and by-laws, and acts through duly elected officers, who represent it in its relations with the public, keep official records, and in general discharge their duties just as do corporate officers. Union members are not subject to either criminal or civil liability for the acts of the union as such, in the absence of proof that they have personally authorized or participated in the acts in question. Union members may sue and be sued by their unions. A union may maintain an action for libel even though the libel did not reflect upon or tend to injure the reputations of the individual members. In the most vital and relevant respects union membership differs from membership in a partnership; union members generally do not have the right to select their fellow members, as do members of partnerships, and may not be expelled from their unions so long as they meet the union membership requirements.

The decision of the court below not only failed to give due weight to the actual characteristics of unions as functioning legal entities, but also was inconsistent with all other judicial decisions which have dealt with the same or similar questions. The question here involved was decided

adversely to the contentions of the respondent by the Circuit Court of Appeals for the Eighth Circuit in *United Mine Workers of America* v. *Coronado Coal Co.*, 258 Fed. 829, 834 (C. C. A. 8, 1919), and the decision of that court was apparently affirmed *sub silentio* by this Court on writ of error (259 U. S. 344). The same result has been reached in all other cases in which the question has been presented, both in relation to labor unions and in relation to other types of unincorporated associations. No case has been cited, and we know of none, in which the privilege here claimed has ever been sustained in circumstances like those here presented.

Furthermore, the reasoning of this Court in such cases as *Hale* v. *Henkel*, 201 U. S. 43, and *Wilson* v. *United States*, 221 U. S. 361, which denied the privilege with respect to corporate books, applies with equal force to the books of unincorporated labor unions. Although those cases relied to some extent upon the visitatorial power of government over artificial entities of its own creation, they in fact involved the right of the federal government to subpoena the records of state corporations, over which it was conceded that the federal government had no general visitatorial power. The reasoning which has led to denial of the privilege in respect of corporate records should equally preclude an unincorporated labor union suspected of violation of federal law

from insulating its records from inspection by placing them temporarily, for all that appears, in the custody of a member who himself has reason to fear prosecution.

ARGUMENT

THE RESPONDENT POSSESSED NO CONSTITUTIONAL RIGHT TO DECLINE TO PRODUCE THE BOOKS AND RECORDS OF THE UNION, REGARDLESS OF WHETHER THEY MIGHT TEND TO INCRIMINATE THE UNION OR HIM INDIVIDUALLY

Both before the grand jury and before the district court the respondent asserted a privilege to decline to produce the union's records not only on the ground that they might tend to incriminate him, individually and as an officer of the union, but also on the ground that they might tend to incriminate the union (R. 3, 11). Both grounds of privilege were likewise asserted in the assignment of errors filed by the respondent in the circuit court of appeals (R. 15).

The circuit court of appeals, however, in its opinion stated the question before it as a single one: "Can the defendant refuse to produce the records of the union on the ground that they will incriminate him?" (R. 21).[5] By its judgment

[5] The dissenting judge, on the contrary, posed and answered two questions: "(1) May the defendant refuse to produce the records of the union on the ground that they will incriminate him; and (2) May he refuse on the ground that their production by him will incriminate the union or its members?" (R. 23).

Both the majority and minority opinions properly recognized (R. 21–22, 23) that no question was presented as to

the court remanded the case to the district court with directions to determine whether the respondent was a member of the union, and, if he was, to examine the books to determine whether they tended to incriminate him as an individual. Whether they tended to incriminate the union or other members was plainly regarded as irrelevant. The court therefore appears to have decided that the tendency, if any, of the records to incriminate the union or its members other than the respondent gave rise to no privilege which the respondent could assert.[6]

The decision of the court below thus involves no holding that a union as such is governed by any rule different from that applicable to corporations—as to which the law is clear that a

whether the records subpoenaed "contained disclosures so related to his personal acts as to make them virtually his own," or concerned only his "private or personal" affairs. See 8 Wigmore on *Evidence*, 3d ed., pp. 346–347. No claim to this effect was made, and the nature of the documents subpoenaed negatives the possibility that any such claim could properly have been made.

[6] Possibly the premise of the court's conclusion in this respect was the doctrine that the privilege against self-incrimination is personal and may not be asserted by one person on behalf of another. However, an unincorporated association no less than a corporation can speak only through individuals who represent it. Consequently a holding that the respondent, shown to be an official of the union and in possession of the subpoenaed records, could not assert a privilege on behalf of the union is equivalent to a holding that the union had no privilege.

subpoena duces tecum may not be resisted by an officer on the ground that the production of the subpoenaed records would tend to incriminate the corporation. *Hale* v. *Henkel*, 201 U. S. 43; *Wilson* v. *United States*, 221 U. S. 361; *Essgee Co.* v. *United States*, 262 U. S. 151. To this extent the decision appears clearly correct. But we submit that the reasoning which places unincorporated associations such as labor unions in the same category as corporations for the purpose of denying them any privilege against self-incrimination should logically place the officials of such unincorporated associations in the same category as corporate officers.[1] The latter may not resist the production of corporate books in response to subpoena even though such books may tend to incriminate them as individuals. *Wilson* v. *United States*, 221 U. S. 361; *Dreier* v. *United States*, 221 U. S. 394; *Wheeler* v. *United States*, 226 U. S. 478; *Essgee Co.* v. *United States*, 262 U. S. 151.

The court below upheld the privilege claimed by the respondent for himself as an individual, provided he was a member of the union. The books and records, although held to be those of the union, and not the private books and records of the respondent alone—so that they did not fall

[1] The rule as to corporate officers is the same even though the officer be the sole stockholder of the corporation. *Grant* v. *United States*, 227 U. S. 74; *United States* v. *Hoyt*, 53 F. (2d) 881 (S. D. N. Y. 1931).

within the rule of *Boyd* v. *United States*, 116 U. S. 616—were nevertheless held to be the private documents of the union members, as distinguished from the union, so that each member could assert in respect of them his own personal privilege against self-incrimination (R. 21, 22). In so holding, the court necessarily concluded that an unincorporated labor organization has no legally recognizable personality apart from its individual members. This conclusion is, we submit, not only unrealistic but also inconsistent with the recognition of union status and personality which pervades modern legislation and judicial thinking in labor matters.

Doubtless in the early days of the republic labor organizations were generally regarded as no more than the aggregate of their members. If they existed at all, they were treated as unlawful conspiracies rather than distinct personalities with privileges and responsibilities cognizable by law. See *The Case of the Philadelphia Cordwainers* (1806), the best report of which appears in 3 Commons & Gilmore, *Documentary History of American Industrial Society*, 59–248 (1910); *The Pittsburgh Cordwainers Case* (1815), 4 Commons & Gilmore, *op. cit.*, 15; 1 Teller, *Labor Disputes and Collective Bargaining*, sec. 60, pp. 150-152. Not until 1842 did the American courts clearly declare labor unions to be lawful. *Commonwealth* v. *Hunt*, 4 Met. (Mass.) 111 (1842);

see Landis, *Cases on Labor Law*, Historical introduction, pp. 32–33.

The modern scene, however, is very different. Since the decision in the first *Coronado* case in 1922, *United Mine Workers* v. *Coronado Coal Co.*, 259 U. S. 344, it has been fully established that an unincorporated labor organization is a proper party to litigation and may sue and be sued. *Operative Plasterers', etc., Ass'n* v. *Case*, 93 F. (2d) 56 (App. D. C. 1937); *Russell* v. *Central Labor Union*, 1 F. (2d) 412 (E. D. Ill. 1924); *In re Cleveland and Sandusky Brewing Co.*, 11 F. Supp. 198, 200 (N. D. Ohio 1935); *National Association of Insurance Agents* v. *Committee for Industrial Organization*, 25 F. Supp. 540 (D. C. 1938); *Green* v. *Gravatt*, 34 F. Supp. 832 (W. D. Pa. 1940). Even the liability of unincorporated labor unions to criminal prosecution is clear. *United States* v. *Greater N. Y. L. P. Chamber of Commerce*, 34 F. (2d) 967, 968 (S. D. N. Y. 1929), affirmed, 47 F. (2d) 156 (C. C. A. 2, 1931), certiorari denied, 283 U. S. 837; *United States* v. *International Fur Workers Union*, 100 F. (2d) 541 (C. C. A. 2, 1938), certiorari denied, 306 U. S. 653; *United States* v. *B. Goedde & Co.*, 40 F. Supp. 523, 528 (E. D. Ill. 1941); cf. *Brown* v. *United States*, 276 U. S. 134; *United States* v. *Local 807*, 315 U. S. 521, 529 et seq.; *United States* v. *American Medical Association*, 110 F. (2d) 703 (App. D. C. 1940), certiorari denied, 310 U. S. 644.

In many states the result of the *Coronado* case has been reached by statute;[7] in other states a variety of procedural devices has been invoked to enable unincorporated associations to appear in court.[8] Rule 17 (b) of the Federal Rules of Civil Procedure provides for suit by or against any unincorporated association "in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States." Since the time of the *Coronado* case, unions have appeared in the courts on innumerable occasions as parties plaintiff or parties defendant in all kinds of actions. At times their presence has been challenged—though rarely with success;[9] but for the most part their standing as litigants has been accorded the silence which accompanies the commonplace. See *General Committee, etc.* v. *Missouri-K-T. R. Co.*, 132 F. (2d) 91, 93 (C. C. A. 5, 1942), reversed on other grounds, October Term, 1943, No. 23, decided November 22, 1943.

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[7] See Cole, *The Civil Liability at Law of Labor Unions* (1939), 8 Fordh. L. Rev. 29, 32–33, footnotes 17–19; Dangel & Shriber, *Labor Unions* (1940), § 458.

[8] See Note (1932) 5 So. Calif. L. Rev. 421–422, footnote 5.

[9] In *Maywood Farms Co.* v. *Milk Wagon Drivers' Union*, 316 Ill. App. 47, 43 N. E. (2d) 700 (1942), a union as well as its officers was held in contempt for violating an injunction running to the union. The court said: "The union is a juridical entity."

The personality of labor organizations has been similarly recognized in other areas. Thus, a labor union possesses a personality entitled to redress against a libel. *Kirkman* v. *Westchester Newspapers, Inc.*, 287 N. Y. 373, 380–381, 39 N. E. (2d) 919 (1942). An attorney representing a union is not the attorney of the individual union members. *Almon* v. *American Carloading Corp.*, 312 Ill. App. 225, 38 N. E. (2d) 362 (1941), noted (1942) 55 Harv. L. Rev. 1038, reversed on other grounds, 380 Ill. 524, 44 N. E. (2d) 592 (1942). There the analogy of labor unions to corporations, rejected in both the majority and minority opinions below (R. 22, 24), was accepted; the court said:

> The personality of such an association is invisible. It is, however, given bodily appearance by the officials and others who act in its name. The same thing is true of a corporation. Through the officials the invisible becomes visible, and thereby associations such as these come to have local habitation and a name. (312 Ill. App., at p. 229.)

The recognition of labor unions as functioning legal entities is no less clearly discernible in modern legislation. In its opinion in the *Coronado* case this Court set out an impressive list of federal and state statutes recognizing labor unions

and, in the main, legislating in their behalf."[a] More recently the National Labor Relations Act, 49 Stat. 449, 29 U. S. C. 151, the Railway Labor Act, 44 Stat. 577, 45 U. S. C. 151, and the Norris-LaGuardia Act, 47 Stat. 70, 29 U. S. C. 101, have given emphasis to the federal recognition of union personality as an essential factor in the design to eliminate the inequality of bargaining power between employees and their employers. See *Findings and Declaration of Policy* in Section 1 of the National Labor Relations Act, 29 U. S. C. 151. The Anti-Racketeering Act, 48 Stat. 909, 18 U. S. C. 420a–e, by its very exception in favor of labor organizations recognizes the existence of such organizations as entities capable of violating the Act. The War Labor Disputes Act, Public No. 89, 78th Cong., evidences similar recognition. Labor unions, we submit, are now accepted fully as juristic personalities, which for most practical purposes act upon and are acted upon by society without regard to the identity of their individual members.

And if unions are now recognized as distinct

[a] 259 U. S. 344, 386–389, footnote 1. The prevalence and multiformity in recent years of legislation and other governmental action predicated on the existence of labor unions as such are so generally appreciated that it seems unnecessary to burden the text of this brief with more than a few prominent illustrations. However, for the convenience of the Court we set out in the appendix a compilation of federal and state action since 1922 affecting the rights and responsibilities of labor unions.

entities in their relationship to society as a whole, we submit that they are likewise distinct entities in their relationship to their members. The court below said (R. 22): "For the purposes of the privilege against self-incrimination the members of the union are in the same position as ordinary individuals who maintain books and records of their transactions.". Herein, we believe, lies the fundamental error of the court.

There is no need to dispute the soundness of the view expressed both in the majority and the minority opinions, that the visitatorial power of the state over corporations derives at least in part from the original charter grant of corporate individuality, and that it differs in scope from such power of visitation as may exist with respect to unincorporated labor unions. Such difference as may there exist, however, is of less significance than the similarities of actual operation between the two types of organizations.[12] A labor union

[12] In *Hemphill* v. *Orloff*, 277 U. S. 537, in holding that a Massachusetts trust was a "corporation" within the meaning of a Michigan statute governing the right to maintain actions in the Michigan courts, this Court said, at p. 550: "Whether a given association is called a corporation, partnership, or trust, is not the essential factor in determining the powers of a state concerning it. The real nature of the organization must be considered. If clothed with the ordinary functions and attributes of a corporation, it is subject to similar treatment."

In *People* v. *Reynolds*, 259 Ill. 11, 182 N. E. 754 (1932), a subpoena duces tecum addressed to a union was served on the president, who appeared and pleaded the constitutional right

functions internally as an organization in much the same way as a corporation. Customarily, it has a constitution and by-laws, holds meetings, elects officers and committees, keeps official records, and in general acts by the same kind of organizational methods as are employed by a corporation.

We submit that it is highly unrealistic to hold, as did the court below, that for the purposes of the privilege the books and records of an unincorporated labor union are the property of the individual members, as distinguished from the union as an entity. The records of a labor union in the custody of an official of the union are as a practical matter no more the private papers of such official than the records of a corporation in the custody of an officer of the corporation are the private papers of such officer. The officers of the union guide its destinies, and act for it

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of the union to protection against unreasonable searches and seizures under the Illinois constitution. No issue of personal privilege on the part of the president was raised. The court, although finding the particular subpoena invalid because of undue breadth, held the union amenable to any properly limited subpoena of its books and records, on the ground of its similarity to a corporation. The court said (350 Ill., at p. 15): "The plaintiff in error invokes this provision [against unreasonable searches and seizures] not for himself but in behalf of the moving picture operators' union of which he is the president. The union, it appears from the answer of the plaintiff in error, has a constitution, by-laws and officers and has exercised corporate powers. These facts show *prima facie* that the union is a corporation and therefore a creature of the State."

in a truly representative capacity. A criminal prosecution of a union and its officers does not bring in the members unless they are specifically made defendants,[13] nor are the members of a union subject to injunction against the continuance of illegal activities by the union officials in the absence of a showing that the members have authorized or participated in such illegal activities. *Eagle Glass & Mfg. Co.* v. *Rowe*, 245 U. S. 275, 280. Service upon an officer or other representative of a union will bring the union within the jurisdiction of a court even though service upon a member as such will not.[14] The responsibility of a union as such is a subject of inquiry separate and apart from the question of the responsibility of its members for illegal acts. *Toledo P. and W. R. R.* v. *Brotherhood of R. R. Trainmen*, 132 F. (2d) 265, 272 (C. C. A. 7, 1942), reversed on other grounds, October Term, 1943, No. 28, decided January 17, 1944. A union may maintain an action for libel even though the libel did not reflect upon

[13] As a matter of consistent practice, in criminal prosecutions under the Sherman Act the union is made a defendant along with specifically named officers or members. E. g., *United States* v. *International Fur Workers Union*, 100 F. (2d) 541 (C. C. A. 2, 1938), certiorari denied, 306 U. S. 653; *United States* v. *Lumber Institute of Allegheny County*, 35 F. Supp. 191 (W. D. Pa. 1940).

[14] *Operative Plasterers', etc., Ass'n* v. *Case*, 93 F. (2d) 56 (App. D. C., 1937); *Dean* v. *International Longshoremen's Ass'n*, 17 F. Supp. 748 (W. D. La., 1936); *Christian* v. *International Ass'n of Machinists*, 7 F. (2d) 481 (E. D. Ky., 1925).

or tend to injure the reputations of the individual members (*Kirkman* v. *Westchester Newspapers, Inc.*, 287 N. Y. 373, 39 N. E. (2d) 919 (1942)), and may even sue to enjoin its own members from unlawfully holding themselves out as acting by union authority. *Thomas* v. *International Seamen's Union of America*, 101 S. W. (2d) 328 (Tex. Civ. App. 1937). As the dissenting judge below pointed out (R. 24–25), union officers may be indicted for embezzlement of union funds (*People* v. *Herbert*, 295 N. Y. S. 251 (1937), *People ex rel. Murphy* v. *Crane*, 80 N. Y. S. 408 (1903)); members of unions generally do not have the right to select their fellow members (see *People* v. *Herbert*, *supra*); and members may not be expelled so long as they meet the union membership requirements (*Abdon* v. *Wallace*, 95 Ind. App. 604, 165 N. E. 68 (1929); *Sweetman* v. *Barrows*, 263 Mass. 349, 161 N. E. 272 (1928)). The partnership analogy implicitly followed by the court below is unsound.

Accordingly, we submit that the court below gave inadequate weight to the practical differentiation which the courts have recognized between the personalities of labor unions and the individual personalities of their members. In so doing, the court not only closed its eyes to the realities of the situation; it disregarded clear lines of judicial authority which we believe should have been accepted as controlling.

The very question now before the Court was presented in *United Mine Workers* v. *Coronado Coal Co.*, 259 U. S. 344. In that case the action was against an unincorporated national union, a number of unincorporated local unions, certain officers of these unions, certain individual members of the union, and others. By orders of the trial court directed to the union and to certain named officers numerous documents were required to be produced at the trial. The United Mine Workers, John P. White, individually and as president of the union, and William Green, individually and as secretary-treasurer of the union, moved to vacate the orders on the ground, among others, that:

> such order of production would violate the constitutional rights of said defendants secured to them under Articles 4 and 5 of the Amendments to the Federal Constitution against unreasonable search and seizures, and compel them to give testimony against themselves in a cause penal in its nature. [Vol. 18 of the Records of this Court (October Term, 1921), p. 328.]

Motions to vacate were likewise made by twenty-four of the locals, on behalf of their members. All the motions were denied.

This claim of privilege under the Fourth and Fifth Amendments was pressed both in the circuit court of appeals and in this Court. It was rejected summarily by the circuit court of appeals

on the authority of *Hale* v. *Henkel*, 201 U. S. 43, *Wilson* v. *United States*, 221 U. S. 361, and *Wheeler* v. *United States*, 226 U. S. 478.[15] In this Court five of the twenty-four assignments of error were devoted to the issue, and it was argued on both sides.[16] While the issue was not mentioned in this Court's opinion, the opinion recited at length the evidence upon which the decision was based. Much of the evidence so noticed by the Court was derived from the documents in question, a circumstance which we believe shows by plain implication that this Court regarded the claim of privilege as being without merit.

The *Coronado* case arose under the Sherman Act, which specifically provided for suit against "corporations and associations" (15 U. S. C. 7, 8). While the terms of that Act, however, may have been relevant to the main issue resolved by the Court—i. e., the issue of the suability of the unions as such[17]—we submit that they have no bearing on the issue of privilege. That issue, if it exists, arises from the Constitution, not from

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[15] *United Mine Workers of America* v. *Coronado Coal Co.*, 258 Fed. 829, 834 (C. C. A. 8, 1919).

[16] See the official report of the arguments, 259 U. S., at pp. 364, 373–376.

[17] Even on the issue of the suability of the unions this Court based its decision primarily on an analysis of the nature, functions, privileges and responsibilities of unions generally, referring to Sections 7 and 8 of the Sherman Act only as giving confirmation to a conclusion already reached for other reasons. 259 U. S., at p. 392.

the statute authorizing the proceedings in which records are required to be produced. Accordingly, we submit that the *Coronado* case, although dealing with the issue *sub silentio*, constitutes authority of this Court in favor of our position on the question now presented.

Other cases in which the issue has been presented have likewise resulted in decisions denying the privilege. See *United States* v. *Greater N. Y. L. P. Chamber of Commerce*, 34 F. (2d) 967 (S. D. N. Y. 1929), affirmed as to other matters, 47 F. (2d) 156 (C. C. A. 2, 1931), certiorari denied, 283 U. S. 837; *United States* v. *B. Goedde & Co.*, 40 F. Supp. 523, 534 (E. D. Ill. 1941); *In re Local Union No. 556, United Brotherhood of Carpenters and Joiners of America*, 33 F. Supp. 544 (N. D. Cal. 1940); *United States* v. *Lumber Products Ass'n*, 42 F. Supp. 910, 916 (N. D. Cal. 1942); see also *People* v. *Reynolds*, 350 Ill. 11, 182 N. E. 754 (1932), *supra*, footnote 12. The same rule has been followed with respect to unincorporated associations other than labor unions. See *Davis* v. *Securities and Exchange Commission*, 109 F. (2d) 6, 8 (C. C. A. 7, 1940), certiorari denied, 309 U. S. 687; *United States* v. *Invader Oil Corporation*, 5 F. (2d) 715 (S. D. Cal. 1925). In the latter case, involving an unincorporated investment trust, the court said: "And the particular form of the organization, as being incorporated or not, seems to furnish no reason for extending the

privilege of the record keeper." Except for the opinion of the majority of the court below in the instant case, we know of no case in which an official of an unincorporated association has been held entitled to decline to obey a subpoena for the association's books and records on the ground that their production might tend to incriminate him.[18]

[18] Nor is any such case cited by the respondent in his brief in opposition to the petition for certiorari. The respondent seeks to draw an implication of such a holding from *Brown* v. *United States*, 276 U. S. 134, 144; and from *Corretjer* v. *Draughon*, 88 F. (2d) 116, 118 (C. C. A. 1, 1937). However, in the *Brown* case, which upheld the validity of a subpoena duces tecum as against a claim that an unincorporated association was not liable to subpoena of its books and records, this Court expressly found it unnecessary to inquire whether "Brown's relation to the association or to the documents in question was such as to entitle him under any circumstances to assert the constitutional privilege" (p. 143), since the question was not adequately presented by the record. The Court noted that for all that appeared in the record it was entirely possible that the district court had disposed of the question of privilege after inspecting the documents and finding that they were not incriminating in character; and the Court pointed out further that if in fact the documents had not been produced by Brown for such inspection, "that alone would constitute a failure to show reasonable ground for his refusal to comply with the requirements of the subpoena." The mere application of the well accepted rule that a witness may not in any event claim a privilege against self-incrimination in respect of documents without first producing the documents for inspection cannot, we submit, be erected into an implication that if the documents had been produced and found to be incriminating their use in evidence would have been privileged.

Corretjer v. *Draughon*, *supra*, in its holding merely followed the *Brown* case. In addition it contained a dictum to

Furthermore, the reasoning of those cases which have declined to accord the privilege to corporate officers in respect of corporate books is, we submit, equally applicable to the books of an unincorporated association. It is true that in *Hale* v. *Henkel*, 201 U. S. 43, and *Wilson* v. *United States*, 221 U. S. 361, much stress is laid upon the power of visitation retained by a state over corporations of its own creation. The asserted absence of any such visitatorial power over unincorporated labor unions was assigned by the court below as its principal ground for distinction of those cases. Yet in both *Hale* v. *Henkel* and *Wilson* v. *United States* the subpoena in respect of which the privilege was claimed and denied was a federal subpoena issued to secure the production of the books and records of a state corporation in connection with an investigation into alleged violations of federal law.[19] The same was true in *Essgee Co.* v. *United States*, 262 U. S. 151, and *Wheeler* v. *United States*, 226 U. S. 478, in the latter of which the privilege was denied in respect of books which by virtue of the dissolution of the corporation

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the effect that a particular political party—the Nationalist Party of Puerto Rico—*might* be sufficiently dissimilar to a corporation so as not to fall within the rule of *Wilson* v. *United States*, 221 U. S. 361.

[19] This Court has likewise upheld the power of a state to compel the production of the books and records of a foreign corporation doing business in the state. *Consolidated Rendering Co.* v. *Vermont*, 207 U. S. 541; *Hammond Packing Co.* v. *Arkansas*, 212 U. S. 322, 347–348.

were conceded to have become for ordinary purposes the property of the former officers. This Court in *Hale* v. *Henkel* explicitly disclaimed any intimation that the federal government "has a general visitatorial power over state corporations" (201 U. S. at p. 75). Rather the visitatorial power relied upon appears to be the power of "'the General Government * * * to see that its own laws are respected * * *. The powers of the General Government in this particular in the vindication of its own laws, are the same as if the corporation had been created by an act of Congress". *Ibid.*

By this, we are of course not suggesting that the power of the federal government to seek the vindication of its own laws authorizes the compulsory production of any documents necessary to that end, regardless of claims of privilege. We do suggest, however, that since labor unions have been so extensively recognized in the law as artificial personalities distinct from the personalities of their members, a labor union official in possession of the union's records, whether or not he is a member of the union, falls within all the reason of the principle stated in *Wilson* v. *United States*:

> The only question was whether as against the corporation the books were lawfully required in the administration of justice. When the appellant became president of the corporation and as such held and used its

> books for the transaction of its business committed to his charge, he was at all times subject to its direction, and the books continuously remained under its control. If another took his place his custody would yield. He could assert no personal right to retain the corporate books against any demand of government which the corporation was bound to recognize (221 U. S. at p. 385).

In this very case, as pointed out above, at pp. 11–12, the court below has implicitly recognized the amenability of the union as such to a subpoena for its books and records. It follows, we believe, that the respondent, as the official in whose possession the books are found, has no greater right than a corporate official to interpose his own fear of personal incrimination as an obstacle to compliance with a subpoena legally directed to the union.

It should be recalled that the record does not disclose whether the respondent was the authorized custodian of the union's books and records, and the conclusion of the court below made this factor irrelevant, since the privilege was held to depend exclusively upon membership in the union. The subpoena was not directed to the respondent, and, for all that appears, the respondent may have possessed himself of the books and records solely for the purpose of attempting to frustrate the Government's demand for their production by the

union. The decision of the court below appears to lead to the conclusion that a labor union suspected of violation of federal law can insulate its records from inspection by placing them temporarily in the custody of a member who himself has reason to fear prosecution. We submit that no such result is required by the Fourth and Fifth Amendments to the Constitution.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment of the court below should be reversed and the judgment of the district court should be affirmed.

CHARLES FAHY,
Solicitor General.

TOM C. CLARK,
Assistant Attorney General.

CHESTER T. LANE,
PHILIP MARCUS,
Special Assistants to the Attorney General.

JESSE CLIMENKO,
MALCOLM A. HOFFMANN,
GEORGE M. FAY,
Attorneys.

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APPENDIX

Federal and State Action since 1922 Affecting Rights and Responsibilities of Labor Unions:

Federal Government action.

1. Exemption from income taxes. 26 U. S. C. § 101.

2. Under the National Labor Relations Act, 29 U. S. C. § 158, unions are protected against interference, restraint, or coercion by employers of labor. See *Edison Co.* v. *Labor Board*, 305 U. S. 197, 236: "The Act contemplates the making of contracts with labor organizations." By the same act, 29 U. S. C. § 159, a federal agency determines, in case of dispute, what union the employees have selected as their collective bargaining representative. Unions have been allowed to maintain actions for rights given under the Railway Labor Act, 45 U. S. C. § 151, e. g., *Virginian Ry.* v. *Federation*, 300 U. S. 515.

3. By the Norris-LaGuardia Act, 29 U. S. C. § 103, anti-union contracts are declared to be contrary to the public policy of the United States and denied enforcement in any court of the United States.

4. The Anti-Racketeering Act, 18 U. S. C. § 420 (d), provides that the Act shall not be applied so as to diminish or affect in any manner the rights of bona fide labor unions in lawfully carrying out their legitimate objects.

5. Collective bargaining provided for under Railway Labor Act, 45 U. S. C. § 152.

6. Unions given right to go into bankruptcy. 11 U. S. C. § 1 (8).

7. Right of employees of a debtor in bankruptcy to join a union protected. 11 U. S. C. § 672.

8. Right of labor union to be heard on economic soundness of plan for corporate reorganization provided for. 11 U. S. C. § 606.

9. "Suitable employment" defined in Railroad Unemployment Insurance Act so as to protect the strength of the union and its appeal to members. 45 U. S. C. § 354 (c). Unions are considered employers for the purpose of this Act, 45 U. S. C. § 351.

10. War Labor Board approves union maintenance contracts and has required them in a number of cases, e. g., 5 War Lab. Rep. 1, 26.

11. Workers for PWA projects secured through local employment agencies but union members secured through unions. *Handbook of Federal Labor Legislation*, Bulletin No. 39, Part I, p. 50.

12. PWA workers may unionize and collectively bargain. *Ibid.*

13. Unionization approved for WPA workers. *Id.*, p. 73.

14. Trade-mark status given to union label by patent office on theory union is a juristic person. See (1942) 10 L. R. R. 635.

15. Section 9 of the War Labor Disputes Act of June 25, 1943 (Pub. L. No. 89, 78th Cong.) prohibits labor unions from making contributions in connection with any election of a member of Congress or in connection with any presidential election.

16. Union security provisions suspended by War Labor Board for unauthorized strikes, 5 War Lab. Rep. 47.

State Government action.

1. Employer cannot discharge or refuse to hire employee because of union affiliation. 12 States with legislation to this effect are named in Smith and DeLancey, *The State Legislatures and Unionism*, (1940) 38 Mich. L. Rev. 987, 996, fn. 29.

2. Unions encouraged through collective bargaining provisions in state labor relations acts. Massachusetts, Michigan, Minnesota, New York, Pennsylvania, Utah, and Wisconsin are stated to have such acts. Smith and DeLancey, *supra*, p. 996. Additional states are: California, *Calif. Labor Code* (Deering 1941 Supp.), Div. 2, Pt. 3, Sec. 1126; Colorado, *Colo. Session Laws 1943*, Ch. 131, Sec. 6; Rhode Island, *Pub. Laws of R. I. 1941–1942*, Chs. 1066, 1247; see also Maine, *Me. Laws 1941*, Ch. 292.

3. Written contracts between labor unions and employers providing for arbitration enforceable at law. *N. Y. Civil Practice Act*, Sec. 1448.

4. Representation on state apprenticeship councils. *Mont. Laws 1941*, Ch. 149; *Ore. Laws 1943*, Ch. 457, Sec. 7; *N. Y. Executive Law* (McKinney's), Art. 12-A.

5. Labor unions given special privileges with respect to disability and life insurance transactions, *Calif. Stats. and Amendments to Codes 1941*, Ch. 1060, Sec. 2.

6. Employers to recognize employee's assignments of percent of wages to unions, *Utah Code Ann.* (1943), 49–14–1.

7. Labor unions expressly made subject to unfair labor practice provisions in state labor relations laws in Massachusetts, Michigan, Minnesota, Pennsylvania, and Wisconsin. See Unkovic, *The Pennsyl-*

vania Labor Relations Act (1939), 44 Dick. L. Rev. 16, 20–21. In *Christoffel* v. *Wisconsin Employment R. Board*, 10 N. W. (2d) 197 (Wis. 1943), a finding by the state labor board of unfair labor practices by a union was sustained.

8. Registration required. See discussion of Kansas, Minnesota, Utah, and Wisconsin laws in 2 Feller, *Labor Disputes and Collective Bargaining* (1940), Sec. 466. To the statutes there mentioned should be added *Kans. Laws, 1943*, Ch. 191; *Texas Session Laws 1943*, Ch. 104, Sec. 5.

9. Labor unions denied the benefit of the anti-injunction statute where they coerce an employer to violate the state or National Labor Relations Act. *43 Pa. Stats.* (Purdon), § 206d (c).

10. Labor unions prohibited from, or penalized for, denying membership or equal treatment to members on account of race, color, or creed: *Kans. Gen. Stats.* (Corrick, 1941 Supp.), 44–801; *Neb. Compiled Stats.* (1941 Supp.), 48–801; *N. Y. Civil Rights Law* (McKinney's), 43; *43 Pa. Stats.* (Purdon), 211.3 (f). Cf. *Ala. General Acts, 1943*, No. 298, Sec. 8; *Wis. Statutes, 1941*, Sec. 111.06. See Witmer, *Civil Liberties and The Trade Union*, (1941) 50 Yale L. J. 621, 625, fns. 15, 16, for reference to a similar attitude by some courts, the Restatement of Torts and foreign legislation. See also Order of the President's Fair Employment Practice Committee, 12 U. S. L. Week (Sec. 2) 2303.

11. Arkansas requires persons soliciting advertising for labor organizations to file a bond with the Secretary of State. *Ark. Stats.* (Pope Supp. 1942), p. 464.

12. Georgia prohibits strikes, slowdowns or stoppage by labor unions, with certain

exceptions, prior to a 30-day notice to the employer. 16 *Ga. Code Ann.*, Ch. 54–7.

13. Colorado, *Colo. Session Laws, 1943*, Ch. 131, Sec. 20 (1); Florida, *Fla. Laws 1943*, c. 21968, § 6; Idaho, *Ida. Session Laws 1943*, Ch. 76, Sec. 1; Kansas, *Kans. Laws 1943*, Ch. 191, § 5; South Dakota, *S. D. Session Laws 1943*, Ch. 86, Sec. 1; Texas, *Texas Session Laws 1943*, Ch. 104, Sec. 3; and Utah, *Utah Code Ann. (9143)*, 49–13, require annual reports to be made to the Secretary of State.

14. Florida, *Fla. Laws 1943*, c. 21968, § 9; Massachusetts, *Mass. Gen. Laws*, Ch. 150A, Sec. 4A; and Oregon, *Ore. Laws 1939*, Ch. 2, proscribe specified unfair labor practices by unions.

15. Business agents of unions are required to obtain an annual license from the Secretary of State in Florida, *Fla. Laws 1943*, c. 21968, § 4, and Kansas, *Kans. Laws 1943*, Ch. 191, § 3. In Texas paid union organizers must register with the Secretary of State. *Texas Session Laws 1943*, Ch. 104, Sec. 5. Upheld in *Ex Parte Thomas*, 174 S. W. (2d) 958 (Tex. Sup. Ct., 1943).

16. Florida, *Fla. Laws 1943*, c. 21968, § 7; Oregon, *Ore. Laws 1939*, Ch. 2; and Texas, *Texas Session Laws 1943*, Ch. 104, Sec. 9, require unions to keep accurate books of account open to the inspection of their members. Minnesota requires financial reports to be made to members, *Minn. Laws 1943*, Ch. 625, Sec. 4, as does Wisconsin, *Wis. Statutes, 1941*, sec. 111.08.

17. Idaho, *Ida. Session Laws 1943*, Ch. 76, Secs. 2–4, and South Dakota, *S. D. Session Laws 1943*, Ch. 86, Secs. 2–5, restrict labor union activities in connection with farm labor.

18. Election of officers provided for and method prescribed. *Colo. Session Laws 1943*, Ch. 131, Sec. 20 (4) (a) (b); Minnesota Labor Union Democracy Act. *Minn. Laws 1943*, Ch. 625, Secs. 2, 3; *Texas Session Laws 1943*, Ch. 104, Sec. 4.

19. Written appointment of officer or agent to represent members of union in collective bargaining to be made a permanent record of the union. *Kans. Stats. Ann. (1935)*, 44-614.

20. Political contributions forbidden *Colo. Session Laws 1943*, Ch. 131, Sec. 20 (4) (c); *Texas Session Laws 1943*, Ch. 104, Sec. 4b.

21. In Texas copies of working agreements with employers containing check-off clauses have to be filed with the Secretary of State and are to be open to grand juries, judicial and quasi-judicial inquiries. *Texas Session Laws 1943*, Ch. 104, Sec. 6.

22. Excessive initiation fees forbidden. *Texas Session Laws 1943*, Ch. 104, Sec. 7.

23. Advance fees restricted. *Texas Session Laws 1943*, Ch. 104, Sec. 8.

24. Taking money for permission to work prohibited. *Texas Session Laws 1943*, Ch. 104, Sec. 8a.

25. Books open to Industrial Commission of Colorado. *Colo. Session Laws 1943*, Ch. 131, Sec. 20 (4) (d). In Texas they are open to enforcement officers upon approval of Attorney General, and are open to "grand juries and judicial and quasi-judicial inquiries in legal proceedings." *Texas Session Laws 1943*, Ch. 104, Sec. 9.

NOTE—Section 20 of Chapter 131 of the *Colo. Session Laws 1943* is premised on the assumption that compulsory incorporation has taken place.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 366

UNITED STATES OF AMERICA,

Petitioner,

v.

JASPER WHITE.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF OF JASPER WHITE IN OPPOSITION

ROBERT J. FITZSIMMONS,
Attorney for Jasper White.

JOHN J. MOONEY,
WARREN H. MAYELL,
of Counsel.

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Opinion Below

The majority (R. 20-23) and dissenting (R. 23-25) opinions in the Circuit Court of Appeals are reported in 137 F. 2d 24. The decision of the District Court rejecting Respondent's claim to immunity and holding him in contempt of court appears at (R. 8-14).

Jurisdiction

The judgment of the Circuit Court of Appeals was entered May 24, 1943 (R. 26), and a petition for rehearing (R. 26-31) was denied on June 18, 1943 (R. 31). The petition for a writ of certiorari was filed September 18,

1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

Questions Presented

Two questions are presented for determination. They are:

(1) May a member of a labor union who is in possession of the books and records of that association and who appears in response to a grand jury subpoena duces tecum, directed to the union, refuse to comply with the subpoena on the ground that production of the records called for might tend to incriminate him?

(2) Did the Circuit Court of Appeals have jurisdiction when the Appeal to it from a judgment of Criminal Contempt was taken by filing notice of appeal pursuant to the Criminal Appeals Rules and without formal written application for appeal as provided by Section 8 (c) of the Act of February 13, 1925?

Constitutional and Statutory Provisions Involved

The Fourth Amendment of the Constitution provides in part:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * *."

The Fifth Amendment provides in part:

> "No person * * * shall be compelled in any criminal case to be a witness against himself."

Section 8 (c) of the Act of February 13, 1925, 43 Stat. 940, 28 U. S. C. sec. 230, provides:

> "No writ of error or appeal intended to bring any judgment or decree before a circuit court of appeals for review shall be allowed unless application therefor be duly made within three months after the entry of such judgment or decree."

Statement

The United States District Court for the Middle District of Pennsylvania in December, 1942, issued a subpoena duces tecum addressed to Local No. 542, International Union of Operating Engineers. This subpoena called for the production of certain books, records and documents before a grand jury of that Court (R. 45). The subpoena was duly served upon the president of the union. Respondent appeared before the grand jury on January 11, 1943 and stated that he was the Assistant Supervisor of the union. Respondent informed the grand jurors that he had brought with him the books, records and documents specified in the subpoena (R. 2-3). He then read a statement which had been prepared for him by counsel and refused to turn over the books, records and documents, claiming "on behalf of Local Union 542, its officers and members, and on my own behalf, the immunity guaranteed by the Fourth and Fifth Amendments of the Constitution of the United States" (R. 2-3).

The respondent was requested to return on January 13, 1943. The grand jury on January 13, 1943 filed a presentment with Judge Albert W. Johnson, presiding at a term of the District Court, charging the respondent with being a contumacious witness and requesting that he be punished (R. 1-2). The Judge on January 14, 1943 conducted a hearing with respect to the presentment. At that time

arguments of counsel were heard. The respondent was present in the court room with the books, records and documents. The Judge did not examine them. He delivered an oral opinion rejecting the respondent's claim to immunity on the theory that a labor union cannot avail itself of the privilege against self incrimination (R. 7-10). The Judge then called the respondent to the bar and ordered him to produce the books, records and documents. The respondent refused to comply and again stated: "* * * I refuse to produce the books or documents referred to in said subpoena, upon the ground that they may tend to incriminate Local No. 542 of the International Union of Operating Engineers and myself as an officer thereof and/or individually. I therefore claim on behalf of Local No. 542, its officers and members, and on my own behalf, the immunity granted under the Fourth and Fifth Amendments of the Constitution of the United States" (R. 11). The Judge then held the respondent in contempt of Court and sentenced him to imprisonment for thirty days (R. 6-7). Respondent was subsequently admitted to bail on his personal bond of one hundred dollars, pending the determination of an appeal by him to the United States Circuit Court of Appeals for the Third Circuit. Respondent filed a notice of appeal pursuant to Rule 3 of the Criminal Appeals Rules (R. 17-18).

The Circuit Court of Appeals reversed the judgment of contempt and remanded the case to the District Court with instructions to that Court to sustain respondent's claim of privilege if it found as a fact that respondent in addition to being an officer of the union was also a member and if it further found that the documents called for by the subpoena did tend to incriminate him (R. 23). Judge Biggs dissented from the majority opinion (R. 23).

The Government filed a petition for rehearing with the Circuit Court of Appeals. The Government in this peti-

tion raised for the first time a question as to whether the Circuit Court of Appeals had jurisdiction to hear respondent's appeal (R. 26-31). The petition for rehearing was denied without opinion (R. 31).

Argument

1. The Court below in reversing the judgment of the District Court held that an officer of a labor union, if also a member, may refuse to produce books and records of the union upon the ground that they might incriminate him. Such a holding is not at variance with any decision of this Court. On the contrary, it is a logical development of fundamental constitutional rights under the Fourth and Fifth Amendments to the United States Constitution. This Court has held that compulsory production of books and papers for the purpose of making a person give evidence against himself in a criminal case not only constitutes a violation of the express provisions of the Fifth Amendment but also is an "unreasonable search and seizure" prohibited by the Fourth Amendment. *Boyd* v. *United States*, 116 U. S. 616.

The Court in the Boyd case (*supra*), however, laid down one rule which must be met before the privilege against self-incrimination can be claimed. This rule requires that the books and papers with respect to which the privilege is asserted must be the witnesses' own books and papers. The Court below, in the majority opinion, in the instant case, recognized the existence of this rule.

The Government in both its brief and argument before the Circuit Court of Appeals compared a labor union to a corporation. From the analogy so drawn the Government concluded that an officer of a labor union could not assert the privilege with respect to books and records of the union. The Court below correctly rejected the position taken by the Government.

Concededly a corporation may not avail itself of the privilege against self-incrimination. *Hale* v. *Henkel*, 201 U. S. 43, nor may a corporate officer refuse to produce corporate records on the ground that they may tend to incriminate him personally. *Wilson* v. *United States*, 221 U. S. 361.

The reasons for such an exception to the general rules of privilege are clearly stated in both *Hale* v. *Hinkel* and *Wilson* v. *United States* (*supra*). A corporation is a creature of the State. From the State it receives certain privileges and franchises which are prerequisites to its existence. Its right to continue as a corporation is governed by the laws of the State of its incorporation and by the terms of the charter, which it has received. The State in the exercise of its sovereignty may at any time inquire as to the manner in which the corporate franchise is being employed. To that end, it may not only demand that the corporation maintain books and records but may also require that the books and records be produced for inspection by State officials whenever the affairs of the corporation are the subject of inquiry. The books and records of a corporation are not the books and records of its stockholders, officers or directors. They are the books and records of a separate legal entity.

As has been pointed out by the Court below in the majority opinion, the status of the labor union of which respondent is Assistant Supervisor differs from that of a corporation. A labor union although recognized as an "entity" for collective bargaining purposes, is not, in fact, a legal entity created by the State. Its officers and members are subject to penal laws covering violence and protection of property. Its officers and members are subject to civil suit and are individually liable for damages. Labor unions and their officers and members remain unfettered by rigid statutory regulations defining and prescribing the power of a corporate body. A trade union is

a voluntary non-profit making unincorporated association. The books and records kept in running the affairs of the membership are the private property of the members. It is true that the books and records called for by the subpoena served upon the union's president in this case were not the property of the respondent exclusively. They were the books and records of all the members of the unincorporated association. They were the private property of the members. The respondent, if a member of the Union, could refuse to produce the books and records called for upon the grounds of personal self-incrimination and still comply with the rule of *Boyd* v. *United States* (*supra*) requiring that the books and records upon which the claim of privilege is based, be the witness' own property.

The Court below in reversing the judgment was not unaware of the fact that the law, for procedural purposes, has recognized that unions function in many respects as entities. Federal legislation has unquestionably conferred substantial privileges upon labor unions. The Courts in sanctioning *bona fide* trade union activities have reiterated the principle that the rights of a labor union are in the aggregate the rights and privileges of the individual members. Fundamental among such rights and privileges is the privilege against self-incrimination. To hold that by the enactment of beneficial labor legislation, the books and records of labor unions have become subject to visitorial inspection by the Federal Government, which would prevail despite the assertion of a fundamental constitutional right by a member of a union in possession of its books, is to place the unincorporated association in the same category as a corporation. Both the majority (R. 22) and the dissenting opinion (R. 24, note 5) in the Court below, rejected the contention of the Government that labor unions belong in the same category as corporations. The dissenting opinion, therefore, denied to the members of a

trade union a privilege which can logically be excluded only on the grounds set forth in *Hale* v. *Henkel* (*supra*) and *Wilson* v. *United States* (*supra*).

2. The majority opinion in the Court below in reversing the respondent's conviction cited as an authority *Brown* v. *United States*, 276 U. S. 134. The Brown case involved an appeal by the defendant from a judgment of conviction for contempt of court in failing to produce the books and records of an unincorporated association of which he was an officer. When presented to the District Court as a contumacious witness, Brown contended that the books and records would tend to incriminate him personally. He therefore asserted his privilege under the Fifth Amendment to the United States Constitution. Brown did not produce the books and records before the District Judge for his examination as to whether or not they would tend to incriminate. He merely asserted the privilege. It was because of that fact that this Court on appeal expressly left undetermined the question as to whether the privilege could have been asserted after the production of the books and records. This Court, however, did strongly indicate that the claim of privilege would be sustained if the books and records had been produced and they had, in fact, tended to incriminate him personally. *Brown* v. *United States*, 276 U. S. 134, at 144. See also *Corretzer* v. *Draughon*, 88 F. 2d 116, 118 (C. C. A. 1).

3. *Certiorari* should not be granted in the present case because the decision of the Circuit Court of Appeals is not final. The Circuit Court directed that the case be remanded to the District Court to ascertain whether or not respondent was, in fact, a member of the union and, if that be the case, to examine the books and records to determine whether or not they did tend to incriminate him. If both these facts be established, the District Court was then to sustain the respondent's claim of privilege. If this case

be remanded to the District Court in conformity with the judgment of the Court below, a determination may be made that the books and records are not incriminating. In that event, the decision of the District Court might not be brought up for review. If this Court should presently grant *certiorari*, it may determine a question which will not actually arise in the District Court. If *certiorari* is not granted by this Court, and the District Court sustains the respondent's claim to privilege, the Government could then appeal directly to this Court. The Criminal Appeals Act, Title 18, United States Code, Section 682, provides a direct appeal by the Government to this Court from a judgment sustaining a special plea in bar when the defendant has not been put in jeopardy. This Court has held that self-incrimination may be asserted as a special plea in bar *United States* v. *Murdock*, 284 U. S. 141. This Court in the Murdock case (*supra*) further held that it would have jurdisdiction to hear the appeal by the Government even though the respondent did not particularly designate his plea of self-incrimination as a plea in bar in the District Court.

4. No real question relating to the jurisdiction of the Circuit Court of Appeals is presented. The appeal of the respondent was orally authorized and allowed by the District Court. The method to be followed by the respondent in perfecting his appeal, including specific directions as to the time for filing a notice of appeal and a record on appeal, was given by the District Court to the respondent's counsel with the consent of the United States Attorney (R. 11-14). Where an appeal is actually allowed in open court, a formal petition for allowance of appeal and an order thereon is not essential.

See:

Sage v. *Railroad Company*, 96 U. S. 712;
Brown v. *McConnell*, 124 U. S. 489;

Draper v. *Davis*, 102 U. S. 370;
Brandies v. *Cochrane*, 105 U. S. 262.

The failure to file a petition for allowance of appeal is not a jurisdictional defect even where there is no actual allowance in open court as in the present case. This Court has so stated in *Alaska Packers Assn.* v. *Pillsbury*, 301 U. S. 174 and *Reconstruction Finance Corporation et al.* v. *Prudence Securities Advisory Group et al.*, 311 U. S. 579.

Following the decision of this Court in *Nye* v. *United States*, 313 U. S. 33, wherein it was held that an appeal from a judgment of criminal attempt should be taken by petition for allowance of appeal rather than by filing notice of appeal, Title 18, United States Code, Section 689 was enacted. This extended the provisions of Sections 687 and 688 of Title 18 to proceedings to punish for criminal contempt of court. Sections 687 and 688 of Title 18 give to this Court the power to prescribe rules of practice and procedure in criminal cases. The enactment of Section 689 of Title 18 was apparently taken by the District Court in the case at bar as an indication that the decision in *Nye* v. *U. S.* (*supra*) was no longer to be considered in determining the method of appeal from a judgment of criminal contempt and that the rules promulgated under Sections 687-688 of Title 18 were now applicable to proceedings to punish for criminal contempt.

The respondent should not be prejudiced by a latent claim of lack of jurisdiction in the Circuit Court of Appeals to hear his appeal when it was perfected in good faith, with all possible diligence and in accordance with the directions of the District Court.

Conclusion

For the reasons stated the petition for a writ of *certiorari* should be denied.

October 25, 1943.

Respectfully submitted,

ROBERT J. FITZSIMMONS,
Attorney for Jasper White.

Of Counsel:

JOHN J. MOONEY,
WARREN H. MAYELL.

FILE COPY

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ROBERT J. FITZSIMMONS,
Attorney for Respondent, Jasper White.

JOHN J. MOONEY,
WARREN H. MAYELL,
of Counsel.

February, 1944.

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Opinion Below

The opinion of the Circuit Court of Appeals is reported at 137 F. (2d) 24.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on May 24, 1943 (R. 26) and petition for rehearing was denied on June 18, 1943. The petition for a writ of certiorari was filed on September 18, 1943, and was granted on November 8, 1943. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Question Presented

Whether a member of a labor union, who is in possession of union records, demanded for production before a grand jury pursuant to a subpoena duces tecum addressed to the union, may refuse to produce those records on the ground that their production may tend to incriminate him.

Constitutional Provisions Involved

The Fourth Amendment to the Constitution provides in part:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * *."

The Fifth Amendment provides in part:

> "No person * * * shall be compelled in any criminal case to be a witness against himself * * *."

Statement

The District Court of the United States for the Middle District of Pennsylvania, on December 28, 1942, issued its subpoena duces tecum directed to "Local No. 542, International Union of Operating Engineers", requiring the union to produce before the grand jury on January 11, 1943, copies of the constitution and by-laws of the union, and specifically enumerated union records showing its collections of work-permit fees, including the amounts paid therefor, and the identity of the payors, from January 1, 1942, to the date of the issuance of the subpoena (R. 4, 5). The subpoena was issued during the course of a grand jury investigation into alleged irregularities in connection with the construction of the Mechanicsburg Naval Supply Depot (R. 20). It was directed to the union and served on the union's president (R. 5).

On January 11, 1943, respondent, Jasper White, appeared before the grand jury, acknowledged that he had the demanded documents in his possession, but, describing himself as "assistant supervisor" of the union, declined to produce them, "upon the ground that they might tend to incriminate Local Union 542, International Union of Operating Engineers, myself as an officer thereof, or individually" (R. 2, 3). He reiterated his refusal to produce the records after consultation with counsel, even though asked by the prosecutor whether his position would be the same if he were assured that "the Union itself will not be a defendant * * *" (R. 3). On January 13, 1943, he was cited for contempt of court, and during the hearing reiterated his refusal to produce the records (R. 11). Respondent had the records with him and was prepared to tender them for inspection by the district judge in support of his assertion that their contents would tend to incriminate him or the union. He based his refusal to produce them on an opinion of his counsel that his claim of privilege was justified by the fact "that great uncertainty exists today as to what may or may not constitute a violation of Section 276 (b), Title 40, of the United States Code" (R. 2, 3).[1]

The district judge took the view that a member of a union in possession of its records could not lawfully refuse to produce them upon the ground of personal self-incrimination. This conclusion was predicated upon the assumption that the union was a separate entity which did not have the privilege in its own right. The district judge

[1] This is the so-called "Anti-Kickback Act" (Act of June 13, 1934, c. 482, 48 Stat. 948, 40 U. S. C. 276(b). Section 1 of this Act, which was the subject of construction in United States v. Laudani, Oct. Term, 1943, No. 71, decided Jan. 3, 1944, provides:

That whoever shall induce any person employed in the construction, prosecution or completion of any public building, public work, or building or work financed in whole or in part by loans or grants from the United States, or in the repair thereof to give up any part of the compensation to which he is entitled under his contract of employment, by force, intimidation, threat of procuring dismissal from such employment, or by any other manner whatsoever, shall be fined not more than $5,000, or imprisoned not more than five years, or both.

reasoned therefrom that respondent could not claim immunity because the records of a third person would incriminate him (R. 8-10). The district court adjudged respondent guilty of a contempt of court and sentenced him to thirty days' imprisonment (R. 11, 12). Immediately after sentence the respondent was released pending appeal on his personal bond in the amount of One hundred dollars (R. 14).

The court below was divided in its reversal of the judgment of conviction. The majority held that the records of an unincorporated labor union were the property of all its members, and that, therefore, if respondent were a union member, and if the books and records would have tended to incriminate him, he properly could refuse to produce them before the grand jury (R. 22). The majority rejected the analogy which the Government attempted to draw between corporations and unincorporated labor unions. They emphasized the existence of the corporation as a creature of the state, enjoying privileges and franchises subject to the laws of the state and the limitations of its charter. As opposed to the implicit duty of corporations to keep books and records of their transactions for inspection by the state when so demanded, the majority pointed out the private nature of union documents and the right of the members to refrain from keeping any records in the absence of legislation to the contrary. For the purpose of the privilege against self-incrimination, they held that the members of a union are in the same position as ordinary individuals who maintain books and records of their transactions (R. 22).

Accordingly, the court below remanded the case to the district court with directions to sustain the claim of privilege if after further inquiry it should determine that respondent was in fact a member of the union and that the books would tend to incriminate him as an individual (R. 22-23). The dissenting judge took the position that a labor

union, even if unincorporated, is an organizational entity functioning as such independently of its individual members, that consequently its records are not the property of its individual members, and that, since the privilege against self-incrimination cannot be asserted in respect of the books and papers of a third person, the refusal to produce them before the grand jury was not authorized by the Fifth Amendment (R. 25).

Summary of Argument

The court below held that respondent, if a member of an unincorporated trade union, could refuse to produce union records in his possession in response to a subpoena directed to the union on the ground that their production might tend to incriminate him as an individual. In so holding, the court correctly held that the reasoning of this Court in such cases as *Hale* v. *Henkel*, 201 U. S. 43, and *Wilson* v. *United States*, 221 U. S. 361, which denied the privilege with respect to corporate books, did not apply to the books of unincorporated labor unions. Those decisions are predicated upon the visitorial power of government over artificial entities of its own creation.

Even if a union were conceded to act as a juridical entity for procedural purposes, that fact alone would not bring the union and its members within the scope of the decisions in *Hale* v. *Henkel*, *supra*, and *Wilson* v. *United States*, *supra*. It is not mere existence as an entity, but rather existence as an entity in the corporate form, with special franchises and privileges granted by the sovereign, that makes an organization subject to the rule in those cases.

Unions are not as a matter of fact entities apart from their members. Mere ability to sue or be sued in a common name, either because of an enabling statute of some state or because of the federal rule established in *United Mine Workers* v. *Coronado Coal Co.*, 259 U. S. 344, does not

change the unincorporated association from a collection of individuals to an entity existing separate and apart from the members composing it. The rights and liabilities of members of an unincorporated association differ from those of stockholders in a corporation. Suits may be brought against all the members of an unincorporated association by a suit against them in their common name. If judgment against the association is unsatisfied, resort may be had to a suit against any of the individual members of the association for the full amount. This unlimited personal liability is in marked contrast to the liability of a corporate stockholder. Members of an unincorporated association are common or joint owners of its personal property. In many jurisdictions, unincorporated associations are incapable of taking title to real property. In those jurisdictions where an association can take title to real property, the title is held to actually vest in all the individual members.

The many statutes affecting unincorporated trade unions which have been recently enacted do not change the fundamental nature of such unions from an aggregate of individuals to an entity. The validity of such statutes is not impaired by retention of the long prevalent theory of the unincorporated association as lacking entity apart from its members. Labor unions should not be held to have undergone a change in their fundamental natures by statutes which were not enacted for such a purpose, but which rather seek only to control the manner in which an aggregate of persons use their collective power. The use of combined effort to protect constitutional rights does not necessitate incorporation.

The fact that an unincorporated association is not juridically considered a person is clear from an examination of many statutes in the United States Code. Associations are not "persons" within the definition found in the General Construction Law. Moreover, when it is desired to

bring them within the definition of "persons" subject to any statute, express statement of that purpose must be set forth in the statute. None of the statutes to which unincorporated associations are subject, requires a change in the fundamental conception of the unincorporated association as a mere aggregate of individuals.

An unincorporated association may not be indicted for a violation of 40 U. S. C. A. 276 (b). This statute is subject to possible construction making operation of a work-permit system by union officials and members unlawful. The grand jury which requested the books of the union from the respondent was solely concerned with an investigation of the work-permit system. Since an association was not a "person" within the meaning of 40 U. S. C. A. 276 (b), respondent could clearly refuse to produce the records of the union upon the ground that they might tend to incriminate him. In so far as a possible violation of that section was involved, the records of the union were clearly not those of a separate entity.

ARGUMENT

The court below correctly held that a member of an unincorporated labor union possesses a constitutional right to refuse to produce, in compliance with a subpoena duces tecum, records of the union which are in his custody and which might tend to incriminate him.

The privilege against self-incrimination is guaranteed by both the Fourth and Fifth Amendments to the Constitution. The Fifth Amendment explicitly guarantees that no person shall be compelled to be a witness against himself in a criminal proceeding. A grand jury investigation is a criminal proceeding within the definition of the fifth amendment. *Counselman* v. *Hitchcock*, 142 U. S. 547. The Fourth

Amendment protects against unlawful searches and seizures. Compulsory production of self-incriminating records violates not only this Amendment, but also the Fifth Amendment. *Boyd* v. *United States,* 116 U. S. 616.

The subpoena addressed to Local Union 542, International Union of Operating Engineers, called for the production of union records showing the collection of work-permit fees, including the amount paid therefor, and the persons to whom paid, from January 1, 1942, to the date of the issuance of the subpoena (R. 4, 5). Respondent informed both the grand jurors and the district court that his claim of privilege was predicated upon the fact "that great uncertainty exists today as to what may or may not constitute a violation of Section 276 (b), Title 40, of the United States Code[2] (R. 3, 11).

The Government contends that a union member may not assert the privilege against self-incrimination with respect to union records that incriminate him as an individual. The argument is advanced that the union is a separate entity from the members composing it. The Government contends that the reasoning of this Court in such cases as *Hale* v. *Henkel,* 201 U. S. 43, and *Wilson* v. *United States,* 221 U. S. 361, which deny the privilege with respect to corporate books to both the corporation and its officers, applies with equal force to unincorporated labor unions and their members. The Government also contends that respondent could not claim the privilege because the records were not his property within the rule of *Boyd* v. *United States,* 116 U. S. 616.

The respondent contends that the decisions in which this Court has denied the privilege to corporations and to corporate officers are not applicable to the case at bar. Respondent further contends that the test in the *Boyd* case, *supra,* was met by membership in the union.

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[2] See footnote 1, supra.

This Court, *in Hale* v. *Henkel, supra,* stated at length the reasons why a corporation cannot avail itself of the privilege against self-incrimination. A corporation is a creature of state legislation, enjoying privileges and franchises subject to the laws of the state and the limitations of its charter. The state, in the exercise of its sovereignty, may inquire how these franchises are employed, and whether they have been abused. It may demand the production of corporate books and records to accomplish that purpose. Since in *Hale* v. *Henkel, supra,* the right of the federal, rather than the state government, to subpoena the records of state corporations was at issue, the Court took occasion to point out the dual sovereignty to which state corporations are subject. While disclaiming a general visitorial power over them, the Court pointed out that in so far as their franchises bring them within matters of federal jurisdiction, they must exercise their powers in subordination to the authority of Congress to regulate such powers. The authority of the federal government to enforce its own laws is the same as if the corporation had been created by act of Congress (201 U. S., at 75).

This Court in *Wilson* v. *United States,* 221 U. S. 361, held that a corporate officer could not refuse to produce corporate books upon the ground that they might incriminate him as an individual. The reasoning of this decision was predicated upon the existence of the corporation as an entity separate and distinct from its officers. The books which were the subject of subpoena belonged to the corporation. They were not the property of its officers. A corporate officer could not claim the privilege because the books of another person, the corporation, would incriminate him.

The decisions in *Hale* v. *Henkel, supra,* and *Wilson* v. *United States, supra,* are not applicable in the present case. The books and records of an unincorporated trade union are vastly different from the books and records of a corporation. There is nothing, in the absence of legislation, giving the state or federal government power over an un-

incorporated trade union or its officers. The books and records of such organizations are the private property of the members.[3] Respondent was not engaged with his fellow union members in any business for profit. Because of the futility of individual action to obtain just rights and benefits in his field of employment, respondent united with his fellow workers to insure those rights and benefits by collective bargaining. The union is similar, in existence, to a religious organization or a political association. It is simply a group of individuals gathered together and assembled together for the more effective exercise of the constitutional rights which each individual American citizen has, and which he may lawfully exercise to improve his hours, wages, and other conditions of employment. To hold that by mere collective action respondent has forfeited the basic constitutional privilege against self-incrimination is to negative the fundamental concepts upon which trade unionism has been established.

Assuming, without conceding, that the members of a trade union by their joint activity create an organization which exists as an entity, it does not follow that such entity or its members are subject to the rules enunciated in *Hale* v. *Henkel, supra,* and *Wilson* v. *United States, supra.* This Court, in the *Wilson* case, in discussing when the privilege against self-incrimination may not properly be claimed, said:

> "The principle applies not only to public documents in public offices, but also to records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation and the enforcement of restrictions validly established. There the privilege, which exists as to private papers, cannot be maintained." (Wilson v. United States, 221 U. S. 361, 380.)

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[3] Dodd, "Dogma & Practice In the Law of Associations" (1929), 42 Harvard Law Review 977, 992; Wrightington, "The Law of Unincorporated Associations and Business Trusts" (1923), p. 351, footnote 61.

It is clear that it is not the mere existence of an entity that brings it within the rule of the *Wilson* case. Rather it is the existence of an entity doing business in the corporate form with franchises and privileges granted by the sovereign. (Cf. *Wilson* v. *United States*, 221 U. S. at 382, 383.) An unincorporated trade union would not be within the rule even if it were to be considered an entity. The members of the union remain, with respect to claiming the privilege against self-incrimination, in the same position as ordinary individuals who maintain books and records of their transactions. It is significant to note that compulsory incorporation of trade unions has been declared unconstitutional in that it violates the fourteenth amendment to the United States Constitution. (*American Federation of Labor* v. *Industrial Commissioner of Colorado*, 13 Lab. Rel. Rep. 105 [1943].)

The Government in its brief (pp. 13-21) argues that the enactment of many state and federal statutes respecting unincorporated trade unions is affirmative legal recognition of their existence as juristic personalities.[4]

In the early days of their existence, labor unions were treated as illegal conspiracies. See the case of the *Philadelphia Cordwainers, 3 Commons & Gilmore, Documentary History of American Industrial Society*, 59-248 (1910); *1 Teller, Labor Disputes and Collective Bargaining* (1940), Sec. 60, pages 150-152. Their legality was first recognized in *Commonwealth* v. *Hunt*, 4 Met. (Mass.) 111 (1842); *Frankfurter & Greene, The Labor Injunction* (1930); pages 4, 27. While labor unions are now universally considered lawful, they still cannot, in most jurisdictions, sue or be sued in their own name in the absence of an enabling statute.[5] *2 Teller, Labor Disputes and Collective Bargaining,*

[4] See appendix to Govt's brief, pp. 30-35; Dodd "Some State Legislatures Go To War—On Labor Unions" (1944), 29 Iowa Law Review 148.

[5] For compilation of cases, see Sturges "Unincorporated Associations as Parties to Actions", (1923), 33 Yale Law Journal 383, footnote 1; 38 Columbia Law Review, 454, 455 (1938); Witmer "Trade Union Liability; the Problem of the Unincorporated Corporation", 51 Yale Law Journal 40, 41, 42, footnote 9 (1941); Cole, "The Civil Suability at Law of Labor Unions" (1939), 8 Fordham Law Review, 29.

Sec. 462, pages 1362-1366. Almost all states now have such statutes.[6] Labor unions may be sued in the federal court in their common name even in the absence of an enabling statute. *United Mine Workers* v. *Coronado Coal Co.*, 259 U. S. 344. The Government in its brief places great emphasis upon that decision (Govt's. brief, pp. 14, 15, 16, 22, 23, 24). An examination of the *Coronado* case fails to indicate that it introduced more of a change in the conception of trade union personality than was effected by the enabling statutes.[7] The suit was a representative one in which no liability was alleged on the part of the union apart from its members.[8] The Court well recognized that fact. While its holding that a union could be sued in its common name was of great importance, the Court stated that the decision was "—after all, in essence and principle, merely a procedural matter". 259 U. S. 344, 390. It is to be noted that the plaintiff's cause of action in the *Coronado* case was for triple damages under the Sherman Anti-trust Act. The Court expressly alluded to the fact that the Act provided for suit against associations (15 U. S. C. A. 7, 8), 259 U. S. at 392. It has been argued that the holding should be considered as based solely on the terms of the Act. *Warren, Corporate Advantages Without Incorporation* (1929) 648 ff. In any event, there is nothing in the decision to indicate an abandonment of the theory that an association is a mere aggregate of individuals. Rather is support for this theory found in the language of the Court (259 U. S., at 389):

> "To remand persons injured to a suit against each of the 400,000 members to recover damages and to levy on his share of the strike fund, would be to leave them remediless."

The language used by the court is subject to no other interpretation than that the strike fund of the union was

[6] For compilation of statutes, see 38 Columbia Law Review, 454, 456, footnote 15.

[7] 38 Columbia Law Review, 454, 456-459.

[8] 259 U. S. 344, 367 (Argument of Defs. in Error).

not the property of any separate entity but rather the joint property of all the members.

Discussing the *Coronado* case, in its opinion in *Ex Parte Edelstein*, 30 F. (2d) 636[9] (C. C. A. 2, 1929), the court stated at page 638:

> **"We do not, therefore, think that there is even an intimation that the Supreme Court meant to change the doctrine that such associations are aggregations, the political status of whose members is as little enlarged as though they were partners in an ordinary commercial or industrial enterprise."**

The doctrine of the *Coronado* case has been limited to federal causes of action.[10] It has not been followed by many states.[11] Even in its application no inference can be drawn that unions are entities in other than the capacity to appear in their common names as parties plaintiff or defendant. Several federal decisions, wherein unions are referred to as "entities", are explainable in terms of individual liability on an agency theory or of a liberalized procedural theory on service of process. Cf. *Christian* v. *International Association of Machinists*, 7 F. (2d) 481, 482 (E. D. Ky. 1925); *Dean v. International Longshoremen's Association*, 17 F. Supp. 748, 749 (W. D. La. 1936).

Actions brought against trade unions in their common name are, when analyzed, actions predicated upon the individual liability of all the members. The liability of the members is determined by the rules of agency law. If suit

[9] Certiorari denied Sub-Nom. Edelstein v. Goddard, 279 U. S. 851 (1929).

[10] Rule 17(b). The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held; except that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or Laws of the United States.

[11] 51 Yale Law Journal 40, 41, footnote 9.

is brought against any individual member, the plaintiff must establish his liability within those rules. If suit is brought against the association in its common name, the plaintiff to recover must establish that the cause of action is one upon which all the members would be liable.[12] *McCabe* v. *Goodfellow*, 133 N. Y. 89; *Schouten* v. *Alpine*, 215 N. Y. 225. The General Associations Law of New York well illustrates the unlimited personal liability of a union member. Section 13 provides for a class action against a statutorily named representative.[13] Section 15 provides that when in any such action a money judgment is obtained, it must be first satisfied out of any personal or real property belonging to the association, or owned jointly, or in common, by all the members thereof.[14] Section 16 then provides that upon return of an execution against the association, wholly or partially unsatisfied, an additional action may be brought against the individual members with recovery of the costs of the principal suit as part of the damages.[15] Statutes of this nature are clearly

[12] For collection of cases from various jurisdictions, see 38 Columbia Law Review, 454, 457, footnote 18.

[13] General Associations Law of the State of New York, Section 13: "An action or special proceeding may be maintained, against the president or treasurer of such an association, to recover any property, or upon any cause of action, for or upon which the plaintiff may maintain such an action or special proceeding, against all the associates, by reason of their interest or ownership, or claim of ownership therein, either jointly or in common, or their liability therefor, either jointly or severally. Any partnership, or other company of persons, which has a president or treasurer, is deemed an association within the meaning of this section.

[14] General Associations Law of the State of New York, Section 15: "In such an action the officer against whom it is brought cannot be arrested; and a judgment against him does not authorize an execution to be issued against his property, or his person; nor does the docketing thereof bind his real property, or chattels real. Where such a judgment is for a sum of money, an execution issued thereupon must require the sheriff to satisfy the same, out of any personal or real property belonging to the association, or owned, jointly or in common, by all the members thereof."

[15] General Associations Law of the State of New York, Section 16: "Where an action has been brought against an officer, or a counterclaim has been made, in an action brought by an officer, as described in this article, another action for the same cause, shall not be brought against the members of the association, or any of them, until after final judgment in the first action, and a return, wholly or partially unsatisfied or unexecuted, of an execution issued

(*Continued on following page*)

predicated upon the existence of the unincorporated association as a mere collection of individuals and not as a separate entity. The entity theory has not been adopted even to the extent that it is found in the Uniform Partnership Act, wherein the commissioners expressly attempted to conform to the aggregate or common law theory. 7 U. L. A. 1, pages 3, 4, 5.

It is true that in *Kirkman* v. *Westchester Newspapers, Inc.*, the New York Court of Appeals held that a labor union may sue for libel. 287 N. Y. 373, 39 N. E. (2d) 919 (1942). The Court based its decision upon the fact that such an action was maintainable within the provisions of Section 12 of the General Associations Law.[15] Speaking of the alleged libel, the Court stated:

"It does not reflect upon, or tend to injure the reputation of the individual members but it does tend

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thereupon. After such a return, the party in whose favor the execution was issued, may maintain an action, as follows:

1. Where he was the plaintiff or a defendant recovering upon a counterclaim, he may maintain an action against the members of the association, or, in a proper case, against any of them, as if the first action had not been brought, or the counterclaim had not been made, as the case requires; and he may recover therein, as part of his damages, the costs of the first action, or so much thereof, as the sum, collected by virtue of the execution, was insufficient to satisfy.

2. Where he was a defendant, and the case is not within subdivision 1st of this section, he may maintain an action, to recover the sum remaining uncollected, against the persons who composed the association, when the action against him was commenced, or the survivors of them.

But this section does not affect the right of the person, in whose favor the judgment in the first action was rendered, to enforce a bond or undertaking, given in the course of the proceedings therein. Section 11 of this chapter applies to an action brought, as prescribed in this section against the members of any association, which keeps a book for the entry of changes in the membership of the association, or the ownership of its property; and to each book so kept."

[15] General Associations Law of the State of New York, Section 12: "An action or special proceeding may be maintained, by the president or treasurer of an unincorporated association to recover any property, or upon any cause of action, for or upon which all the associates may maintain such an action or special proceeding, by reason of their interest or ownership therein either jointly or in common. An action may likewise be maintained by such president or treasurer to recover from one or more members of such association his or their proportionate share of any moneys lawfully expended by such association for the benefit of such associates, or to enforce any lawful claim of such association against such member or members."

> to discredit the work in which they have a common interest. The injury is thus a common injury and the members have a common interest in the consequent damages." 287 N. Y. 373, 379.

The Court in holding that an action for libel could be maintained under the New York statute did not adopt the entity theory of an unincorporated association. It specifically pointed out that as early as 1853, in *Taylor* v. *Church*, 8 N. Y. 452, the New York Court of Appeals held that partners could sue for libel and recover for injuries done to the character, credit and standing of their firm. 287 N. Y. 373, 380. Certainly partnerships are not entities in New York law. The decision in the *Kirkman* case is purely a determination based upon statutory construction.

Many instances may be given which support the aggregate theory of the unincorporated association. Unincorporated associations lack power to hold real property in their common name in most jurisdictions. Deeds to them are void because of uncertainty as to grantee. To circumvent this difficulty it is necessary to convey real property to trustees for the benefit of the association. *Wrightington, The Law of Unincorporated Associations and Business Trusts* (1923) pp. 336, ff. *Sturges, Unincorporated Association as Parties to Actions* (1923), 33 Yale Law Journal, 383, 391-393. Title to personal property is vested in the individual members of an unincorporated association. It has been held that an indictment for larceny from an association should be laid as a larceny from the property of the individual members and not the association. *Wallace* v. *People*, 63 Ill. 451. An automobile has been declared improperly registered because not registered in the name of all the members of the union. *Hanley* v. *American Ry. Exp. Co.*, 244 Mass. 284, 138 N. E. 323 (1923). In a recent case, distribution of beer by a union to its members was held not to be a sale or gift within the meaning of a statute requiring a license to sell

or distribute on the theory that the beer was the common property of all the individual members. *People* v. *Budzan*, 295 Mich. 547, 295 N. W. 259 (1940). Unincorporated trade unions are not citizens capable of suing or being sued in federal courts on the ground of diversity of citizenship. The citizenship of the individual members is determinative upon the question of federal jurisdiction. *Ex Parte Edelstein*, 30 F. (2d) 636 (C. C. A. 2, 1929); *Levering & Garrigues Co.* v. *Morrin*, 61 F. (2d) 115, 117, (C. C. A. 2, 1932), aff'd 289 U. S. 103 (1933); *International Allied Printing Trades Association* v. *Master Printers Union*, 34 F. Supp. 178 (D. N. J. 1940); *Rosendale* v. *Phillips*, 87 F. (2d) 454, C. C. A. 2, (1937); *Green* v. *Gravatt*, 34 F. Supp. 832 (W. D. Pa. 1940).

The Government, in support of its contention that a labor union has existence as an entity apart from its members, points out the liability of labor unions to criminal prosecution (Govt's. brief, p. 14). The cases cited, with one exception, involve the indictment of a union or other unincorporated association for violation of the Sherman Anti-trust Act.

Associations are defined as "persons" subject to the provisions of the Act. 15 U. S. C. A. 7, 8. It is clear that in the absence of legislative intent, an association does not commit crimes. 7 C. J. S. Associations, Sec. 17, page 43. An association is not within the definition of a "person" in the General Construction Law. 1 U. S. C. A. 1. When Congress desires to make unincorporated associations subject to the provisions of any statute it expressly defines them as "persons" within the meaning of the statute.[17]

[17] 2 U. S. C. A. 241 (f); 7 U. S. C. A. 2, 72, 92 (k) 116 (f) (1), 123, 151, 182, 499a (1), 504, 589 (1), 1561 (a) (2); 15 U. S. C. A. 12, 71, 142, 364, 431 (e); 18 U. S. C. A. 403; 19 U. S. C. A. 172, 1341 (e), 1401 (d); 21 U. S. C. A. 171 (d), 321 (e); 26 U. S. C. A. 3228 (a); 28 U. S. C. A. 390a; 29 U. S. C. A. 53, 113(c), 203(a); 38 U. S. C. A. 592(e); 43 U. S. C. A. 1171; 46 U. S. C. A. 316b, 801; 47 U. S. C. A. 30; 48 U. S. C. A. 471a (1); 48 U. S. C. A. 663(4); 49 U. S. C. A. 401 (27); 50 U. S. C. A. 82(a), with which compare 7 U. S. C. A. 62, 242, and 26 U. S. C. A. 145(c), 894 (b) (2) (D), 3797 (a) (1).

Such legislative action would clearly be unnecessary if unincorporated associations were "persons" in ordinary legal contemplation.

The Government, other than the Anti-trust cases, cites only one authority in support of its contention that labor unions are entities, because of their liability to criminal prosecution. The case relied on by the Government is *United States* v. *Local 807, et al.*, 315 U. S. 521 (Govt's. brief, p. 14). The union involved in that case had been indicted and convicted, along with individual members, for conspiracy to violate Sec. 2(a), 2(b) and 2(c) of the Anti-Racketeering Act of June 18, 1934,[18] and of conspiracy to violate Sec. 1 of the Sherman Anti-trust Act. The Circuit Court of Appeals reversed all the judgments of conviction, 118 F. (2d) 684. The concurring majority opinion reversed the judgment of conviction of Local Union 807 for a violation of the Anti-Racketeering Act on the ground that an unincorporated association was not a "person" capable of committing a crime in violation of its provisions. 118 F. (2d), 684, 688. The Government, on appeal to this Court, asked that the judgments of conviction for violation of the Anti-Racketeering Act be reinstated. It did not seek the review of the judgment of the Circuit Court of

[18] This is the so-called "Anti-Racketeering Act" (Act of June 18, 1934, c. 569, 48 Stat. 979, 18 U. S. C. 420 (a). The Act provides:

"Any person who, in connection with or in relation to any act in any way or in any degree affecting trade or commerce or any article or commodity moving or about to move in trade or commerce—

(a) Obtains or attempts to obtain, by the use of or attempt to use or threat to use force, violence, or coercion, the payment of money or other valuable considerations, or the purchase or rental of property or protective services, not including, however, the payment of wages by a bona-fide employer to a bona-fide employee; or

(b) Obtains the property of another, with his consent, induced by wrongful use of force or fear, or under color of official right; or

(c) Commits or threatens to commit an act of physical violence or physical injury to a person or property in furtherance of a plan or purpose to violate subsections (a) or (b); or

(d) Conspires or acts concertedly with any other person or persons to commit any of the foregoing acts; shall, upon conviction thereof, be guilty of a felony and shall be punished by imprisonment from one to ten years or by a fine of $10,000, or both."

Appeals reversing conviction of the union and of the individual defendants for violation of the Anti-trust Act. 315 U. S. 521, 524.

This Court, in affirming the judgment of the Circuit Court, held that the Anti-Racketeering Act did not apply to the activities of the defendants as disclosed by the record because of the provisions of Sec. 2(a), excepting from punishment "any person" who "obtains or attempts to obtain by the use of, or attempt to use, or threat to use, force, violence or coercion * * * the payment of wages by a bona-fide employer to a bona-fide employee." 315 U. S. 521, 531.

This Court did not pass upon the question as to whether or not the union was a "person" within the provisions of the Anti-Racketeering Act. The Government anticipated that argument by counsel for the union and contended in its brief that the union was a person subject to the Act. (Argument for Gov't., 315 U. S. 521, 524.) It cannot be implied that this Court must have necessarily considered the union as a "person" subject to the Anti-Racketeering Act in order to decide the case as it did. That such an implication is not warranted is clear from the dissenting opinion of Stone, C. J., wherein he states, 315 U. S. 531, 539:

> "I think the judgment should be reversed, and the convictions affirmed, subject only to an examination of the sufficiency of the evidence as to some of the respondents, and to a consideration of whether the union itself is a 'person' within the meaning of the statute."

No discussion involving the concept of the unincorporated association as a legal unit or juristic person would be complete without some reference to the argument that such a concept implies usurpation of legislative power. Only the legislature may create legal units. If the legisla-

ture has declined to do so, courts should not by judicial decision circumvent that intent.[19]

This Court has strongly indicated that a member of an unincorporated association may claim a privilege against self-incrimination and refuse to produce records of the association which tend to incriminate him. *Brown* v. *United States*, 276 U. S. 134 (1928). The *Brown* case involved an appeal from a judgment of conviction of contempt of court. Brown was the secretary of the National Alliance of Furniture Manufacturers. He was served with a subpoena duces tecum, addressed to the association, requiring the production of certain association records before a grand jury. Brown appeared before the grand jury and informed them that there was no such entity as the National Alliance of Furniture Manufacturers capable of appearing in response to the subpoena. Brown did not bring the association records with him. When presented to the District Court as a contumacious witness, Brown for the first time claimed that the production of the records would incriminate him as an individual and be violative of his rights under the Fourth and Fifth Amendments to the Constitution. The District Court overruled his claim to privilege and found him guilty of contempt. Brown thereupon appealed.

This Court, in holding that the subpoena was not a nullity emphasized that the investigation conducted by the grand jury was in connection with possible violations of the Anti-trust Act, to which associations were expressly subject. 276 U. S. 134, 141, 142. Discussing Brown's right to claim the privilege with respect to association records, this Court stated, 276 U. S. 134, 143-145:

> "Whether Brown's relation to the association or to the documents in question was such as to entitle him under any circumstances to assert the constitutional privilege, we do not find it necessary to inquire. All other matters aside, it is impossible for us to say, upon

[19] Warren "Corporate Advantages Without Incorporation" (1929), pp. 1-13.

the record before us, that the claim of such privilege was sustained. Upon Brown's appearance before the grand jury in response to the subpoena, he made no claim of the privilege, but insisted only that there was no such person or entity as the National Alliance capable of being served with a subpoena or of appearing in answer to one. This notwithstanding the fact that his attention was directed to the subject of self-incrimination. Upon his presentment to the District Court as a contumacious witness, he answered, among other things, that to compel him to produce the documents set forth in the subpoena would be to submit to an unlawful seizure and to produce evidence against himself. There was a hearing, but the record fails to disclose what was before the court for its consideration upon that hearing. It appears only that the court held that no sufficient excuse for Brown's conduct had been shown, and he was ordered to again appear before the grand jury and produce the documents called for, whether that body saw fit to administer an oath to him or not. Appearing before the grand jury, he again refused, except on condition that he should be subpoenaed and sworn. Thereupon, he was adjudged by the district court to be in contempt for his failure to comply with its order, and sentenced to imprisonment.

Whether the papers were produced for the inspection of the court does not appear; but it may well be that they were and that from an examination of them it appeared that the claim of privilege was wholly without merit. In any event, it was Brown's duty to produce the papers in order that the court might by an inspection of them satisfy itself whether they contained matters which might tend to incriminate. If he declined to do so, that alone, would constitute a failure to show reasonable ground for his refusal to comply with the requirements of the subpoena. Consolidated Rendering Co. v. Vermont, supra, pp. 552, 553 (207 U. S. 541). As very pertinently said by the Court of Appeals of Kentucky in Commonwealth v. Southern Express Co., 160 Ky. 1, 3: '* * * the individual citizen may not resolve himself into a court and himself determine and assert the criminating nature of the contents of books and papers required to be produced.' See also Ex Parte Irvine, 74 Fed. 954, 960; United

States v. Collins, 145 Fed. 709, 712; Mitchells Case, 12 Abb. Pr. 249, 260-261. And see generally, Blair v. U. S., 250 U. S. 273, 282.

From the foregoing we may properly assume in support of the judgment below that either from an inspection of the papers or from other facts appearing there was disclosed to the district court a want of substance in Brown's claim of privilege. Certainly there is nothing in the record, beyond Brown's mere assertion, that affirmatively shows or tends to show that the claim was well founded."

It should be noted that counsel for Brown clearly asserted the claim to privilege upon the ground that the records of the association would incriminate him as an individual. (Argument for Brown, 276 U. S. at 136.) The Government did not challenge Brown's position in this respect. Rather than denying the existence of the privilege, the Government took the position that Brown failed to justify his refusal to produce the documents by failing to show that he was a member of the association and that its members were not corporations. (Argument of Government, 276 U. S. at 137.)

The Circuit Court of Appeals for the First Circuit has recognized the right of an officer of an unincorporated association to claim the privilege against self-incrimination and to refuse to produce the books and records of the association upon that ground: *Corretjer* v. *Draughon*, 88 F. (2d) 116.

Corretjer was the secretary of a political party in Puerto Rico. A subpoena was served in the course of a grand jury investigation demanding the books and records of the party. Corretjer refused to produce them upon the ground that they would tend to incriminate him. He was adjudged in contempt by the District Court for his failure to produce them. The Circuit Court of Appeals affirmed that judgment because of his failure to produce the books and records. The language of the court may be construed as

indicative of their belief that the privilege could be asserted with respect to records of the association if the petitioner had produced them for inspection.

> "While it is very doubtful whether the situation is the same as in case of an officer of a corporation, who is directed to produce the corporation books and papers as in Wilson v. U. S., 221 U. S. 361, 31 S. Ct. 538, 55 L. Ed. 771, Ann. Case, 1912 D. 558, since a political party in Puerto Rico is not a corporate body, it has been defined as an association of voters believing in certain principles of government and formed to urge the adoption of those principles. 49 Cyc., pages 1074, 1075. It is also questioned whether the subpoena duces tecum was directed to the petitioner as an official of the Nationalist Party, or as an individual; yet he should have produced the papers in his possession as directed and on refusing to deliver them to the grand jury should have appealed to the court and invoked his privilege under the fifth amendment and submitted the documents to the Court for its determination as to whether they were incriminating" (88 F. (2d) 116, 118).

The failure of the party claiming the privilege in both the Brown and Corretjer cases to produce the records for inspection warranted the affirmance of the judgments of conviction. This failure was not present in the case at bar. Respondent had the records in court with him. The position which the district judge took obviated the necessity of examining the record (R. 8-10). The decision of the Circuit Court remanding the case to the district court to take proof as to respondent's membership in the union and to determine whether the records would incriminate him as an individual was accordingly correct.

The Government has cited cases which it states constitute authority in support of its position upon the question presented. (Govt's. brief, p. 22, 23 and 24).[20] It is the con-

[20] U. S. v. Greater N. Y. L. P. Chamber of Commerce, 34 F. (2d) 967 (S. D. N. Y. 1929), aff'd as to other matters 47 Fed. (2d) 156 (CCA 2, 1931); certiorari denied 283 U. S. 837; U. S. v. B. Goedde & Co., 40 F. Supp. 523, 534 (E. D. Ill. 1941); In re Local Union No. 550, United Brotherhood of Carpenters and Joiners of America, 33 F. Supp. 544 (N. D. Cal. 1940); U. S. v. Lumber Products Assn., 42 F. Supp. 910, 916 (N. D. Cal. 1942).

tention of the respondent that these decisions are unsound in so far as they deny to a member of an unincorporated association the right to refuse to produce its books upon the ground that they tend to incriminate him.

An important ground of distinction exists, however, between the cases cited by the government, and the case at bar. Each of the cases cited by the government involve the indictment of a labor union for violation of the Anti-trust Act. As has been heretofore pointed out, associations have been defined in the Act as "persons" within its provisions. Therefore, the unions were capable of indictment as well as the individual officers and members. The grand jury which sought the books and records of Local Union 542, in the case at bar, was not investigating a possible violation of the Anti-trust Act by the union. It was solely interested in ascertaining whether or not there had been a violation of the Anti-Kickback Statute,[21] because of the operation of a work-permit system. An examination of the contents of the subpoena duces tecum discloses that all the records sought by the grand jury pertain to the operation of such a system (R. 4, 5). The grand jury affirmatively indicated that it was not interested in an indictment of the union as a separate entity (R. 3). Respondent maintains that the union could not have been indicted for a violation of the Anti-Kickback Act. The word "whoever" as found in 40 U. S. C. A. 276 (b) is not otherwise defined in the statute. Giving it the common dictionary meaning, the word would include "any person."[22] But as has already been pointed out, an unincorporated association is not a "person" within the definition found in the General Construction Law. 1 U. S. C. A. 1. It is noteworthy that whenever Congress desired to make a statute applicable to unincorporated associations, it explicitly mentions them in the statute as within the class of persons to whom the law

[21] See footnote 1, supra.

[22] Funk & Wagnalls "New Standard Dictionary" (1937), p. 2709; Webster's "New International Dictionary" (2d Ed., 1936), p. 2921.

applies.[23] A striking example of this is found in the very title and chapter of the United States Code containing the Anti-Kickback Act. Title 40, Sections 270(a), 270(b) and 270(c) of the United States Code use the term "any person" in stating to whom the sections are applicable. Title 40, Section 270(d) then proceeds to define the term "any person" as found in the foregoing sections. It provides "The term 'person' and the masculine pronoun as used in Sections 270(a), 270(b) and 270(c) of this title shall include all persons, whether individuals, associations, copartnerships, or corporations." The provisions of Title 40, Sections 270(a), 270(b) and 270(c) are not penal. Title 40, Section 270(a) provides for the furnishing of a bond to the United States by any person engaged as a contractor on a public work. Title 40, Section 270(b) provides for the rights of persons furnishing labor or material for public works to obtain payment. Section 270(c) provides for the right of a person who has furnished labor and material on a public work to obtain a certified copy of his bond. Certainly if Congress has seen fit to define the term "any person" as used in certain sections of Title 40 of the United States Code which are not even penal in nature, its failure to do so with respect to the penal provisions found in Section 276(b) of that title cannot be considered other than as an indication that the provisions shall not apply to associations. It is clear that in the absence of unequivocal legislative intent associations do not commit crimes. C. J. S. Associations, Sec. 17, page 43. Respondent knows of no case in which an unincorporated association has ever been indicted for a violation of 40 U. S. C. A. 276(b). During the course of the investigation for which the grand jury demanded the books of the respondent's union, three indictments for violation of the Anti-Kickback Act were returned against individual members of the union who had acted as shop stewards at the Me-

[23] See footnote 15, supra.

chanicsburg Naval Depot.[24] The union was not indicted. Four officials of a union in Albany were indicted in 1943 for violating the Act. The union was not indicted. *U. S. v. McGraw, et al.*, 47 F. Supp. 927 (N. D. N. Y.). Union officials were indicted in Syracuse, New York, for a violation of the Act, but the union itself was not made a defendant. *U. S. v. Fuller, et al.* (N. D. N. Y.).[25] Officials of a union were indicted in Boston, Mass., for a violation of the Act. The union was not made a defendant. *U. S. v. Carbone, et al.* (D. C. Mass.):[26]

The argument of the Government that the privilege against self-incrimination may not be claimed by the respondent because the books and records were the property of a separate entity, the union, certainly cannot be sustained in a case where the union is not considered an entity within the provisions of the statute allegedly violated by the respondent. Such a situation is present in the case at bar. The cases cited by the Government involving indictments of unions under the Anti-trust Act are therefore readily distinguishable.

Conclusion

For the reasons stated, it is respectfully submitted that the judgment of the court below was correct in remanding the case to the district court with directions to determine whether respondent was a member of the union, and if he was, to examine the books, and sustain the privilege if they tended to incriminate him as an individual.

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[24] U. S. v. Baker; U. S. v. Burkett; U. S. v. Sweeney (M. D. Pa.), pending. Indict. No. 10891, 10982, 10893.

[25] Unreported officially, but decision overruling demurrer decided Sept. 7, 1943 is copied in 6 Wage Hour Rep't. 1090.

[26] U. S. v. Carbone, et al., Indict. No. 16016, motion for reargument of demurrer pending.

The judgment of the court below should therefore be affirmed.

Respectfully submitted,

ROBERT J. FITZSIMMONS,
Attorney for Respondent, Jasper White.

JOHN J. MOONEY,
WARREN H. MAYELL,
of Counsel.

February, 1944.

SUPREME COURT OF THE UNITED STATES.

No. 366.—October Term, 1943.

United States of America, Petitioner, vs. Jasper White.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[June 12, 1944.]

Mr. Justice Murphy delivered the opinion of the Court.

During the course of a grand jury investigation into alleged irregularities in the construction of the Mechanicsburg Naval Supply Depot, the District Court of the United States for the Middle District of Pennsylvania issued a subpoena duces tecum directed to "Local No. 542, International Union of Operating Engineers." This subpoena required the union to produce before the grand jury on January 11, 1943, copies of its constitution and by-laws and specifically enumerated union records showing its collections of work-permit fees, including the amounts paid therefor and the identity of the payors from January 1, 1942, to the date of the issuance of the subpoena, December 28, 1942.

The United States marshal served the subpoena on the president of the union. On January 11, 1943, respondent appeared before the grand jury, describing himself as "assistant supervisor" of the union. Although he was not shown to be the authorized custodian of the union's books, he had the demanded documents in his possession. He had not been subpoenaed personally to testify nor personally directed by the subpoena duces tecum to produce the union's records. Moreover, there was no effort or indicated intention to examine him personally as a witness. Nevertheless he declined to produce the demanded documents "upon the ground that they might tend to incriminate Local Union 542, International Union of Operating Engineers, myself as an officer thereof, or individually." He reiterated his refusal after consulting counsel.

He was immediately cited for contempt of court and during the hearing on the contempt repeated his refusal once again. He

based his refusal on the opinion of his counsel that "great uncertainty exists today as to what may or may not constituate a violation of Section 276(b), Title 40, of the United States Code."[1] He made no effort, although he apparently was willing, to tender the records for the judge's inspection in support of his assertion that their contents would tend to incriminate him or the union. The District Court held his refusal inexcusable, adjudged him guilty of contempt of court and sentenced him to thirty days in prison.

The court below reversed the District Court's judgment by a divided vote. 137 F. 2d 24. The majority held that the records of an unincorporated labor union were the property of all its members and that, if respondent were a union member and if the books and records would have tended to incriminate him, he properly could refuse to produce them before the grand jury. The court below accordingly remanded the case to the District Court with directions to sustain the claim of privilege if after further inquiry it should determine that respondent was in fact a member of the union and that the documents would tend to incriminate him as an individual. We granted certiorari, 320 U. S. 729, because of the novel and important question of constitutional law which is presented.[2]

The only issue in this case relates to the nature and scope of the constitutional privilege against self-incrimination. We are not concerned here with a complete delineation of the legal status of unincorporated labor unions. We express no opinion as to the legality or desirability of incorporating such unions or as to the

[1] This was a reference to the so-called "Kickback" Act, which was before us in United States v. Laudani, 320 U. S. 543. Section 1 of the Act provides that whoever shall induce any person employed in the construction, prosecution or completion of any public building or work financed in whole or in part by the United States, or in the repair thereof, to give up part of his compensation by force, intimidation, threat or procuring dismissal from employment, or by any other manner whatsoever shall be fined not more than $5,000, or imprisoned not more than five years, or both. Act of June 13, 1934, c. 482, 48 Stat. 948, 40 U. S. C. § 276(b).

[2] In its petition for a writ of certiorari in this case, the Government claimed that respondent had taken his appeal to the Circuit Court of Appeals by filing a notice of appeal pursuant to the Criminal Appeals Rules rather than by application for appeal as required by Section 8(c) of the Act of February 13, 1925, c. 229, 43 Stat. 940, 28 U. S. C. § 230. See Nye v. United States, 313 U. S. 33, 43-44. It appears, however, that at the contempt hearing an extensive colloquy took place between the district judge and counsel with respect to the perfecting of the appeal and respondent at that time made in effect an oral application for appeal which was allowed by the court within the meaning of the Act of February 13, 1925.

necessity of considering them as separate entities apart from their members for purposes other than the one posed by the narrow issue in this case. Nor do we question the obvious fact that business corporations, by virtue of their creation by the state and because of the nature and purpose of their activities, differ in many significant respects from unions, religious bodies, trade associations, social clubs and other types of organizations, and accordingly owe different obligations to the federal and state governments. Our attention is directed solely to the right of an officer of a union to claim the privilege against self-incrimination under the circumstances here presented.

Respondent contends that an officer of an unincorporated labor union possesses a constitutional right to refuse to produce, in compliance with a subpoena duces tecum, records of the union which are in his custody and which might tend to incriminate him. He relies upon the "unreasonable search and seizure" clause of the Fourth Amendment and the explicit guarantee of the Fifth Amendment that no person shall be compelled in any criminal case to be a witness against himself. We hold, however, that neither the Fourth nor the Fifth Amendment, both of which are directed primarily to the protection of individual and personal rights, requires the recognition of a privilege against self-incrimination under the circumstances of this case.

The constitutional privilege against self-incrimination is essentially a personal one, applying only to natural individuals. It grows out of the high sentiment and regard of our jurisprudence for conducting criminal trials and investigatory proceedings upon a plane of dignity, humanity and impartiality. It is designed to prevent the use of legal process to force from the lips of the accused individual the evidence necessary to convict him or to force him to produce and authenticate any personal documents or effects that might incriminate him. Physical torture and other less violent but equally reprehensible modes of compelling the production of incriminating evidence are thereby avoided. The prosecutors are forced to search for independent evidence instead of relying upon proof extracted from individuals by force of law. The immediate and potential evils of compulsory self-disclosure transcend any difficulties that the exercise of the privilege may impose on society in the detection and prosecution of crime. While the privilege is subject to abuse and misuse, it is firmly embedded in

our constitutional and legal frameworks as a bulwark against iniquitous methods of prosecution. It protects the individual from any disclosure, in the form of oral testimony, documents or chattels, sought by legal process against him as a witness.

Since the privilege against self-incrimination is a purely personal one, it cannot be utilized by or on behalf of any organization, such as a corporation. *Hale* v. *Henkel*, 201 U. S. 43; *Wilson* v. *United States*, 221 U. S. 361; *Essgee Co.* v. *United States*, 262 U. S. 151. See also *United States* v. *Invader Oil Corp.*, 5 F. 2d 715. Moreover, the papers and effects which the privilege protects must be the private property of the person claiming the privilege, or at least in his possession in a purely personal capacity. *Boyd* v. *United States*, 116 U. S. 616. But individuals, when acting as representatives of a collective group, cannot be said to be exercising their personal rights and duties nor to be entitled to their purely personal privileges. Rather they assume the rights, duties and privileges of the artificial entity or association of which they are agents or officers and they are bound by its obligations. In their official capacity, therefore, they have no privilege against self-incrimination. And the official records and documents of the organization that are held by them in a representative rather than in a personal capacity cannot be the subject of the personal privilege against self-incrimination, even though production of the papers might tend to incriminate them personally. *Wilson* v. *United States*, *supra*; *Dreier* v. *United States*, 221 U. S. 394; *Baltimore & Ohio R. Co.* v. *Interstate Commerce Commission*, 221 U. S. 612; *Wheeler* v. *United States*, 226 U. S. 478; *Grant* v. *United States*, 227 U. S. 74; *Essgee Co.* v. *United States*, *supra*. Such records and papers are not the private records of the individual members or officers of the organization. Usually, if not always, they are open to inspection by the members and this right may be enforced on appropriate occasions by available legal procedures. See *Guthrie* v. *Harkness*, 199 U. S. 148, 153. They therefore embody no element of personal privacy and carry with them no claim of personal privilege.

The reason underlying the restriction of this constitutional privilege to natural individuals acting in their own private capacity is clear. The scope and nature of the economic activities of incorporated and unincorporated organizations and their representatives demand that the constitutional power of the federal and

state governments to regulate those activities be correspondingly effective. The greater portion of evidence of wrongdoing by an organization or its representatives is usually to be found in the official records and documents of that organization. Were the cloak of the privilege to be thrown around these impersonal records and documents, effective enforcement of many federal and state laws would be impossible. See *Hale* v. *Henkel*, *supra*, 70, 74; 8 Wigmore on Evidence (3rd ed.) § 2259a. The framers of the constitutional guarantee against compulsory self-disclosure, who were interested primarily in protecting individual civil liberties, cannot be said to have intended the privilege to be available to protect economic or other interests of such organizations so as to nullify appropriate governmental regulations.

The fact that the state charters corporations and has visitorial powers over them provides a convenient vehicle for justification of governmental investigation of corporate books and records. *Hale* v. *Henkel*, *supra*; *Wilson* v. *United States*, *supra*. But the absence of that fact as to a particular type of organization does not lessen the public necessity for making reasonable regulations of its activities effective, nor does it confer upon such an organization the purely personal privilege against self-incrimination. Basically, the power to compel the production of the records of any organization, whether it be incorporated or not, arises out of the inherent and necessary power of the federal and state governments to enforce their laws, with the privilege against self-incrimination being limited to its historic function of protecting only the natural individual from compulsory incrimination through his own testimony or personal records.

It follows that labor unions, as well as their officers and agents acting in their official capacity, cannot invoke this personal privilege. This conclusion is not reached by any mechanical comparison of unions with corporations or with other entities nor by any determination of whether unions technically may be regarded as legal personalities for any or all purposes. The test, rather, is whether one can fairly say under all the circumstances that a particular type of organization has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common or group interests only. If so, the privilege cannot be invoked on behalf

of the organization or its representatives in their official capacity. Labor unions—national or local, incorporated or unincorporated—clearly meet that test.

Structurally and functionally, a labor union is an institution which involves more than the private or personal interests of its members. It represents organized, institutional activity as contrasted with wholly individual activity. This difference is as well defined as that existing between individual members of the union. The union's existence in fact, and for some purposes in law, is as perpetual as that of any corporation, not being dependent upon the life of any member. It normally operates under its own constitution, rules and by-laws which, in controversies between member and union, are often enforced by the courts. The union engages in a multitude of business and other official concerted activities, none of which can be said to be the private undertakings of the members.[3] Duly elected union officers have no authority to do or sanction anything other than that which the union may lawfully do; nor have they authority to act for the members in matters affecting only the individual rights of such members. The union owns separate real and personal property, even though the title may nominally be in the names of its members or trustees.[4] The official union books and records are distinct from the personal books and records of the individuals, in the same manner as the union treasury exists apart from the private and personal funds of the members. See *United States* v. *B. Goedde & Co.*, 40 F. Supp. 523, 534. And no member or officer has the right to use them for criminal purposes or for his purely private affairs. The actions of one individual member no more bind the union than they bind another individual member unless there is proof that the union authorized or ratified the acts in question. At the same time, the members are not subject to either criminal or civil

[3] In United Mine Workers of America v. Coronado Coal Co., 259 U. S. 344, 385, this Court described the union there involved in the following terms: "The membership of the union has reached 450,000. The dues received from them for the national and district organizations make a very large annual total, and the obligations assumed in traveling expenses, holding of conventions, and general overhead cost, but most of all in strikes, are so heavy that an extensive financial business is carried on, money is borrowed, notes are given to banks, and in every way the union acts as a business entity, distinct from its members. No organized corporation has greater unity of action, and in none is more power centered in the governing executive bodies."

[4] Lloyd, The Law Relating to Unincorporated Associations (1938) 165 ff.; Wrightington, The Law of Unincorporated Associations (2d ed. 1923) 336 ff.

liability for the acts of the union or its officers as such unless it is shown that they personally authorized or participated in the particular acts. See *Lawlor v. Loewe*, 235 U. S. 522; *Eagle Glass & Mfg. Co.* v. *Rowe*, 245 U. S. 275.

Moreover, this Court in *United Mine Workers of America* v. *Coronado Coal Co.*, 259 U. S. 344, held that labor unions might be made parties defendant in suits for damages under the Sherman Act by service of process on their officers.

Both common law rules and legislative enactments have granted many substantive rights to labor unions as separate functioning institutions. In *United Mine Workers of America* v. *Coronado Coal Co., supra*, 385-386, this Court pointed out that "the growth and necessities of these great labor organizations have brought affirmative legal recognition of their existence and usefulness and provisions for their protection, which their members have found necessary. Their right to maintain strikes, when they do not violate law or the rights of others, has been declared. The embezzlement of funds by their officers has been especially denounced as a crime. The so-called union label, which is a quasi trademark to indicate the origin of manufactured product in union labor, has been protected against pirating and deceptive use by the statutes of most of the states, and in many states authority to sue to enjoin its use has been conferred on unions. They have been given distinct and separate representation and the right to appear to represent union interests in statutory arbitrations, and before official labor boards." Even greater substantive rights have been granted labor unions by federal and state legislation subsequent to the statutes enumerated in the opinion in that case.[5]

These various considerations compel the conclusion that respondent could not claim the personal privilege against self-incrimination under these circumstances. The subpoena duces tecum

[5] Outstanding examples of federal legislation enacted subsequent to the *Coronado* case giving recognition to union personality are the National Labor Relations Act, 49 Stat. 449, 29 U. S. C. § 151, the Railway Labor Act, 44 Stat. 577, 45 U. S. C. § 151, and the Norris-LaGuardia Act, 47 Stat. 70, 29 U. S. C. § 101. The Anti-Racketeering Act, 48 Stat. 979, 18 U. S. C. § 420a, *e*, excepts certain types of activity by labor unions, thereby recognizing them as entities capable of violating the Act. The War Labor Disputes Act, 57 Stat. 163, 50 U. S. C. App. § 1501, evidences a similar recognition. See, in general, 1 & 2 Teller, Labor Disputes and Collective Bargaining (1940), Part V. For references to and discussions of recent state labor legislation, see *id.*, Part VI; Smith and DeLancey, "The State Legislatures and Unionism;" 38 Michigan Law Rev. 987.

was directed to the union and demanded the production only of its official documents and records. Respondent could not claim the privilege on behalf of the union because the union did not itself possess such a privilege. Moreover, the privilege is personal to the individual called as a witness, making it impossible for him to set up the privilege of a third person as an excuse for a refusal to answer or to produce documents. Hence respondent could not rely upon any possible privilege that the union might have. *Hale* v. *Henkel, supra,* 69-70; *McAlister* v. *Henkel,* 201 U. S. 90. Nor could respondent claim the privilege on behalf of himself as an officer of the union or as an individual. The documents he sought to place under the protective shield of the privilege were official union documents held by him in his capacity as a representative of the union. No valid claim was made that any part of them constituted his own private papers. He thus could not object that the union's books and records might incriminate him as an officer or as an individual.

It is unnecessary to determine whether or not respondent was a member of the union in question, for in either event he could not invoke the privilege against self-incrimination under these facts. It is likewise immaterial whether the union was subject to the provisions of the statute in relation to which the grand jury was making its investigation. The exclusion of the union from the benefits of the purely personal privilege does not depend upon the nature of the particular investigation or proceeding. The union does not acquire the privilege by reason of the fact that it is not charged with a crime or that it may not be subject to liability under the statute in question. The union and its officers acting in their official capacity lack the privilege at all times of insulating the union's books and records against reasonable demands of governmental authorities.

The judgment of the court below must be reversed and that of the District Court affirmed.

Mr. Justice ROBERTS, Mr. Justice FRANKFURTER and Mr. Justice JACKSON concur in the result.